Supreme Court, U.S.
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No. 95-414

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CIG EXPLORATION, INC.,
Petitioner,

v.

UTAH STATE TAX COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of Utah

BRIEF OF RESPONDENT, UINTAH COUNTY, UTAH

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Additional Statutory Provisions	1
Statement of the Case	1
Supplemental Facts	1
Proceedings Below	3
Reasons for Denying the Writ	5
A. There is no conflict between the decision of the Utah Supreme Court and federal or constitutional law	5
B. Resolution of the petitioner's request for refund required only a factual determination by the Utah Supreme Court	8

TABLE OF CONTENTS

Page

C. This Court's decision in *Reich v. Collins* is clearly distinguishable from the instant case and does not provide a basis for this Court's review 10

Conclusion 11

Addendum 1:
Memorandum in Support of Motion for Summary Judgment, filed by petitioner in the Eighth District Court of Uintah County, State of Utah, No. 910800160

TABLE OF AUTHORITIES

Page

CASES

Alnoa G. Corp. v. City of Houston, Tex., 563 F.2d 769, *cert. denied* 98 S.Ct. 1610, 435 U.S. 970, 56 L.Ed.2d 62 (1977) 6

Federal Power Commission v. Louisiana Power & Light Co., 92 S.Ct. 1827, 406 U.S. 621, 32 L.Ed.2d 369 (La. 1972) 6

FPC v. United Gas Pipe Line Co., 386 U.S. 237 (1967) 6

Garrett v. Bamford, 394 F.Supp. 902, *rev'd on other grounds* 538 F.2d 63, *cert. denied* 97 S.Ct. 485, 429 U.S. 977, 50 L.Ed.2d 585 (1975) 6

Harper v. Virginia Department of Taxation, ___ U.S. ___, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993) 10

Hawaiian Telephone Co. v. State Dept. of Labor and Indus. Relations, 691 F. 2d 905 (2d Cir. 1982) 6

TABLE OF AUTHORITIES

CASES — Page

Keleher v. New England Tel. & Tel. Co., 947 F.2d 547 (2d Cir. 1991) 6

Maryland v. Louisiana, 451 U.S. 724 (1981) 6

Northern Natural Gas Co. v. State Corp. Comm'n, 372 U.S. 84 (1963) 6

Reich v. Collins, 115 S.Ct. 547 (1994) 4, 10

STATUTES AND OTHER AUTHORITIES

Utah Code Ann. § 59-2-201(1) 1, 4

Utah Code Ann. § 59-2-1321 ..... 2, 5, 8

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Utah Code Ann. § 59-2-201(1) provides in relevant part:

> (1) By May 1 of each year the following property shall be assessed by the commission at 100% of fair market value, as valued on January 1, in accordance with this chapter:
>
> * * *
>
> (e) all mines and mining claims . . . .

STATEMENT OF THE CASE

Pursuant to Supreme Court Rules 15.1 and 24.2, respondent sets forth the following supplemental facts, which were misstated or omitted from petitioner's statement of facts.

SUPPLEMENTAL FACTS

Petitioner has laid out a lengthy history of the gas shortages in the 1970s and the reasons for its creation in 1973 in connection with a Gas Search Program under which its parent, Colorado Interstate Gas Company ("CIG") transferred to petitioner all of its gas leases and production properties. This Gas Search Program was part of a settlement agreement

filed in 1973 (the "1973 Settlement"), which was approved by the Federal Energy Regulatory Commission ("FERC") on January 7, 1974. Petitioner also noted that in 1982, three years after it began charging CIG the higher "tight sands" rate, CIG's primary public utility customer, the city and County of Denver, together with various other customers, brought suit against CIG, alleging violation of the 1973 Settlement.

Petitioner omitted to state that it was not until August of 1989, seven years after petitioner became aware that the prices it was charging were disputed, that the petitioner sent a letter to the then sitting Board of Commissioners of Uintah County and the Uintah County Attorney, notifying them that petitioner sought a refund of *ad valorem* taxes for the tax years 1981 through 1986[1], which petitioner claimed had been "erroneously" assessed, within the meaning of Utah Code Ann. § 59-2-1321[2].

Thereafter, petitioner waited until June of 1991 to take any further action to recover the allegedly "erroneously

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1 Also of significance is the fact that the petitioner continued to charge the higher "tight sands" rates during the four years after litigation was initiated to halt the practice.

2 *See* Addendum 1, Memorandum in Support of Motion for Partial Summary Judgment, filed by petitioner in the Eighth District Court of Uintah County, State of Utah, No. 910800160, at page 7, ¶ 20.

collected" taxes, despite the fact that the FERC order, which petitioner alleges gives rise to its right to a refund, became final and non-appealable on August 1, 1989[3].

Respondent objects to petitioner's characterization of portions of the final FERC order upon which petitioner bases its claim. Petitioner asserts that the FERC order declared the prices charged by petitioner to be erroneous, thus mandating the requested refund. In fact, the FERC expressly held that its approval of the refund settlement did not constitute approval of, or precedent regarding, any principle or issues in these proceedings[4].

PROCEEDINGS BELOW

This action arose as a result of petitioner charging rates which the FERC determined to be in violation of the 1973 Settlement. That determination, however, was not made final and non-appealable until August of 1989[5].

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3 *Id.*, at page 8, ¶ 21.

4 *See* Order Approving Settlement with Modifications, issued August 1, 1989, Appendix D to Petition for Writ of Certiorari, at page 22a.

5 *See* n. 3, *supra*.

The taxes at issue were assessed and collected for the years 1981 through 1986, inclusive. The statutory scheme of property taxation in the State of Utah revolves around the value of property on January 1 of each year, viewed retrospectively[6]. It is clear, then, that the FERC order upon which petitioner's alleged right to refund rests was not known, nor was it knowable, at the time petitioner's property was assessed in each of the tax years in question[7].

Petitioner litigated its right to charge higher rates before the FERC over a period of seven years. Petitioner then exercised its due process rights by demanding a refund of allegedly overpaid *ad valorem* taxes from Uintah County. When its demand was denied, petitioner filed suit in state court to obtain a refund. Failing there, petitioner sought review from the Utah Supreme Court. Thereafter, based on this Court's decision in *Reich v. Collins*, 115 S.Ct. 547 (1994), petitioner sought a rehearing from the Utah Supreme Court, which was denied.

Finally, petitioner has sought review from this Court,

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[6] Utah Code Ann. § 59-2-201(1).

[7] As noted above, petitioner was aware as early as 1982 that the rates it applied during the years at issue were contested by its customers. Respondents, however, were not made aware of that situation and first received notice in August of 1989, when petitioner filed its first demand for refund.

asserting that the decision of the Utah Supreme Court, affirming the district court's decision and denying petitioner a refund is violative of "the supremacy of federal law and the due process which States must afford taxpayers who have been assessed taxes based upon rates which violate federal law."[8]

REASONS FOR DENYING THE WRIT

A. There is no conflict between the decision of the Utah Supreme Court and federal or constitutional law.

It is undisputed that the petitioner owns property situated within the State of Utah and that petitioner's property is subject to *ad valorem* taxation. The tax at issue, therefore, is not illegal within the meaning of Utah Code Ann. § 59-2-1321.

The "federal law" which petitioner asserts is in direct conflict with the decision of the Utah Supreme Court is the final, non-appealable FERC order. Petitioner seeks to have that order elevated to the status of a federal statute governing property rights and due process rights of natural gas producers.

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[8] Petition for Writ of Certiorari, at page 7.

While it is true that the FERC has broad discretion to exercise regulatory power of Congress only over transportation of natural gas in interstate commerce, its sale in interstate commerce for resale, and natural gas companies engaged in such transportation or sale[9], that power in no way impacts a state's ability to assess and collect taxes. There is a strong federal policy of noninterference with state taxation and state tax administration[10]. This case does not present a situation which merits abandonment of that policy.

Petitioner misinterprets this Court's rulings in *Maryland v. Louisiana*, 451 U.S. 724 (1981), *Northern Natural Gas Co. v. State Corp. Comm'n*, 372 U.S. 84 (1963), and *FPC v. United Gas Pipe Line Co.*, 386 U.S. 237 (1967), when it argues that these authorities stand for the proposition that, because FERC has authority to regulate the relationship between gas purchasers' cost structures and eventual costs to wholesale

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9 *Federal Power Commission v. Louisiana Power & Light Co.*, 92 S.Ct. 1827, 406 U.S. 621, 32 L.Ed.2d 369 (La. 1972).

10 *Hawaiian Telephone Co. v. State Dept. of Labor and Indus. Relations*, 691 F. 2d 905 (2d Cir. 1982); *Alnoa G. Corp. v. City of Houston, Tex.*, 563 F.2d 769, *cert. denied* 98 S.Ct. 1610, 435 U.S. 970, 56 L.Ed.2d 62 (1977); *Keleher v. New England Tel. & Tel. Co.*, 947 F.2d 547 (2d Cir. 1991); *Garrett v. Bamford*, 394 F.Supp. 902, *rev'd on other grounds* 538 F.2d 63, *cert. denied* 97 S.Ct. 485, 429 U.S. 977, 50 L.Ed.2d 585 (1975).

consumers[11], FERC also has the authority to dictate to the State of Utah when and to whom it must refund taxes.

The fundamental flaw in petitioner's reasoning is the premise that the FERC order, which does nothing more than grant to petitioner the "right to seek recovery of and retain Third Party Excess Payments and Related Costs"[12] ("Related Costs" are defined in the order as including the "principal amount of all taxes[13]"), confers upon petitioner a substantive property right. In fact, petitioner has fully exercised whatever "right" the FERC order may be deemed to have conferred by seeking a refund, however unsuccessful that effort may have been[14].

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11 *See* Petition for Writ of Certiorari, page 8.

12 See Appendix E to Petition for Writ of Certiorari, page 27a.

13 *Id.*

14 The FERC order also provides that petitioner and/or its parent, CIG, "may retain (i.e., shall not be required to pass through to its customers) any Third Party Excess Payments and Related Costs (together with any interest recovered thereon) which [petitioner and/or its parent, CIG] *may* recover back from such persons or entitles." (Emphasis supplied.) *See* Appendix E to Petition for Writ of Certiorari, page 27a. Clearly, the language in the FERC order contemplates that petitioner may be wholly or partially unsuccessful in its efforts to recover Related Costs or Third Party Excess Payments. This language is in stark

B. Resolution of the petitioner's request for refund required only a factual determination by the Utah Supreme Court.

At core, petitioner seeks to re-characterize this controversy from one involving resolution of purely factual issues (*i.e.*, the appropriate valuation of petitioner's property upon which the *ad valorem* tax is imposed), to one involving questions of federal supremacy and due process. In fact, petitioner is simply seeking an additional forum to press its claim for refund by attempting to interpret the FERC order as conferring jurisdiction over tax assessment and collection within the State of Utah on the FERC.

The Utah Supreme Court viewed the case as requiring resolution of whether the fact that the FERC had determined in 1989 that petitioner breached the 1973 Settlement by charging excessive rates constituted an erroneous assessment under § 59-2-1321. In its decision, the court stressed that the entire statutory tax scheme in the State of Utah depends on the value of property as of January 1 of each year. The court noted that, while the FERC ultimately determined petitioner had charged rates which were too high and violated the 1973 Agreement, the rates which petitioner had actually charged in

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contrast to petitioner's position that the FERC order directs the refunds to be made under the FERC's authority to control and regulate gas prices.

each of the tax years in question were controlling on the issue of whether an erroneous assessment had been made.

Petitioner argues that, because the FERC order specifically states the FERC did not make a retroactive rate change, the FERC made a *nunc pro tunc* determination of the rates petitioner was authorized to charge[15]. Thus, petitioner, argues, the refusal to grant a refund "makes manifest that the [Utah Supreme Court] made the unwarranted determination that it was permissible for petitioner to charge NGPA incentive prices *at that time*[16]. (Emphasis in original.)

The Utah Supreme Court ***did not*** determine that petitioner was permitted to charge incentive prices; it merely determined that petitioner ***had*** charged incentive prices and that the value of the petitioner's property was correctly determined

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15 *See* Petition for Writ of Certiorari, page 10. The FERC order rejected petitioner's claim that the FERC order directing petitioner to refund the amount it had overcharged was a retroactive rate change, denying petitioner's due process rights. Similarly rejected was petitioner's argument that the refund order was an unconstitutional taking of property in violation of the Fifth Amendment to the United States Constitution. The FERC specifically noted that it was not addressing the issue of rates, but was merely enforcing the 1973 Settlement. *See* Appendix F to Petition for Writ of Certiorari, page 49a.

16 *Id.*

as of January 1 in each of the tax years at issue using the prices that petitioner had actually charged.

C. This Court's decision in *Reich v. Collins* is clearly distinguishable from the instant case and does not provide a basis for this Court's review.

Petitioner has attempted to characterize the decision of the Utah Supreme Court as being at odds with this Court's ruling in *Reich v. Collins, supra*. The holding in that case is clearly inapposite.

The tone of the *Reich* decision is set in the first sentence written by Justice O'Connor:

> In a long line of cases, this Court has established that due process requires a "clear and certain" remedy **for taxes collected in violation of federal law**.

Id, at 549. It is apparent, then, that the wrong this Court redressed in the *Reich* decision was the collection of taxes in violation of federal law. This theme is apparent throughout the decision. This Court explained that its holding in *Reich* (citing *Harper v. Virginia Department of Taxation*, ___ U.S. ___, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)), was predicated on the principle that:

> . . . "a denial by a state court of a recovery of taxes **exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment**," [citations omitted], the sovereign immunity States traditionally enjoy in their own courts notwithstanding.

Id. [Emphasis added.]

Nowhere does petitioner argue that the State of Utah may not impose an *ad valorem* tax on petitioner's property situated within the State of Utah. Such an argument would be frivolous. The FERC order is not a "federal law" nor is it a constitutional provision. As the order, itself, points out, it is merely a remedy enforcing the 1973 Settlement, the terms of which the FERC found petitioner had violated[17].

CONCLUSION

The imposition of the tax is not in conflict with any federal law or constitutional provision. The tax is not violative of any Utah statute. Petitioner has not argued that the ***tax*** is illegal. Further, it cannot be seriously disputed that

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17 *See* Appendix F to Petition for Writ of Certiorari, page 49a.

the value of the property, as of January 1 in each of the relevant tax years, was correct in light of the rates which petitioner was actually charging at the time the assessments were made. The taxes which the petitioner seeks to have refunded cannot, therefore, have been illegally or erroneously collected. Petitioner's attempt to elevate this factual dispute to a case involving due process and federal supremacy issues should be soundly rejected. For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX 1

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF UINTAH COUNTY

STATE OF UTAH

* * * * * * * * *

CIG EXPLORATION, INC., Plaintiff, vs. UTAH STATE TAX COMMISSION, UINTAH COUNTY, GLEN MCKEE, LORRIN MERRELL, and MAX ADAMS, UINTAH COUNTY COMMISSIONERS and DONNA RICHENS, UINTAH COUNTY TREASURER, Defendants.	MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT (Oral Argument Requested) No. 910800160 Judge John R. Anderson

* * * * * * * * *

INTRODUCTION

Plaintiff CIG Exploration, Inc. ("Exploration"), pursuant to Rule 4-501 of the Utah Code of Judicial Administration, hereby submits this Memorandum in Support of its Motion for Partial Summary Judgment. Exploration brought this action to recover overpaid ad valorem taxes which Uintah County levied for tax years

1981 through 1986 on the assessed value of Exploration's gas rights in the Natural Buttes Field in Uintah County, Utah. Exploration is entitled to a refund of overpaid ad valorem taxes for the years stated because (1) the Tax Commission assessed the fair market value of Exploration's underground gas rights based upon the proceeds from the sale of gas production in the prior year for each year at issue; (2) subsequent to the payment of ad valorem taxes levied on such assessments, the Federal Energy Regulatory Commission ("FERC") ordered Exploration to reduce the price charged for this gas and refund a portion of the proceeds received in those years to Exploration's customers; and (3) consequently, the proceeds upon which the Tax Commission's assessment was determined were incorrect and the amount of taxes paid to Uintah County based upon the Commission's assessment was excessive and erroneous.

By its Motion for Partial Summary Judgment, Exploration seeks to establish the Tax Commission's liability as to the erroneous assessment of Exploration's property and the remaining defendants' liability to refund the ad valorem taxes Exploration paid to Uintah County for the years 1981 through 1986 in excess of taxes which would and should have been paid based upon the FERC mandated prices for those years. Exploration's Motion is based upon its First Claim for Relief, which seeks a refund of erroneously overpaid ad valorem taxes pursuant to Utah Code Ann. § 59-2-1321 (1993). This statute provides for such a refund.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. During the interstate gas shortages of the early 1970s, Colorado Interstate Gas Company ("CIG"), an interstate gas pipeline, was required by the Federal Power Commission ("FPC"), predecessor to the FERC, to create a new subsidiary ("Exploration") as a condition to conducting a special gas search program to explore for and produce new gas reserves to be dedicated to its retail customers.

2. In accordance with a Stipulation and Agreement ("Stipulation") entered in 1973 between Exploration, CIG and CIG's retail customers, and approved in 1974 by the FPC, Exploration was required to complete a gas search program within a specified period. Any newly discovered reserves located during that period were irrevocably dedicated to CIG's pipeline system, so that CIG's existing customers had a right of first refusal to the gas ahead of new customers.

3. Reserves were discovered by Exploration during the prescribed period in Utah, Wyoming, Texas, and Oklahoma.

4. Under the pricing terms of the 1973 Stipulation, CIG was required to purchase "new gas" from Exploration under gas purchase contracts containing purchase prices not to exceed the area rate permitted under the Natural Gas Act, 15 U.S.C. § 717 et seq. ("NGA") or, in the event of deregulation, CIG was required to pay the area rate in effect immediately prior to deregulation for

a period of one year, and thereafter, that price was to be escalated one and one-half cents per Mcf per year.

5. In 1978, Congress enacted a new regulatory scheme in the Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 et seq. (1978) ("NGPA"). The NGPA provided for "new gas" prices under 15 U.S.C. § 3312 (1982); Natural Gas Policy Act of 1978 Pub. L. No. 95-621, Title I §§ 102, 103 (1978), which were higher than the "area rates" permitted in the prior regulatory scheme under the NGA.

6. The NGPA permitted additional incentive pricing for "tight sands" gas. 15 U.S.C. § 3317(c)(1) and (c)(5) (1982); 18 CFR § 271.703 (1990); National Gas Policy Act of 1978, Publ. L. No. 95-621 Title I § 107 (1978). The issues in this lawsuit relate solely to "tight sands" gas produced in the Natural Buttes Field.

7. After enactment of the NGPA, Exploration charged CIG up to NGPA maximum incentive prices under Section 107 for "tight sands" gas.

8. The Tax Commission assessed Exploration's property in Uintah County by calculating the fair market value of the property using a factored net revenue method pursuant to Utah Code Ann. § 59-2-201(2)(1988) and Rule R884-10P-1 of the Administrative Rules of the Utah State Tax Commission. This method of assessment incorporated the higher revenues Exploration collected from CIG for program gas sales at "tight sands" prices after enactment of the NGPA.

9. The Uintah County Commissioners ("Commissioners") set the ad valorem tax rate for Uintah County for tax years 1981 through 1986.

10. Based upon the assessments made by the Tax Commission and the tax rates set by the Commissioners, the Uintah County Treasurer ("Treasurer") annually mailed a property tax notice to Exploration for ad valorem taxes allegedly due Uintah County (the "County").

11. Exploration timely paid its ad valorem taxes, levied and listed in each of those notices, to the County, pursuant to Utah Code Ann. §§ 59-2-901 through 59-2-924 (1988).

12. In 1982, Public Service Company of Colorado, a CIG customer and a party to the 1973 Stipulation establishing the gas search program, asserted that CIG and Exploration had violated the pricing provisions of the 1973 Stipulation by charging NGPA prices. Ultimately, the FERC resolved the impact of the NGPA on the pricing provisions included in the FPC approved 1973 Stipulation.

13. The FERC resolved this issue in FERC Opinion No. 306, 44 F.E.R.C. ¶ 61,023 (July 7, 1988) which was affirmed on rehearing in FERC Opinion No. 306A, 45 F.E.R.C. ¶ 61,293 (November 28, 1988) (collectively referred to as "Order 306"). Order 306 provided, in relevant part, that the NGPA pricing provisions did apply to gas sold or produced under the 1973 Stipulation, so that NGPA new gas prices and incentive prices generally replaced area

rates as the regulated price for gas sold under the gas search program.

14. The FERC held, however, that in order to qualify specifically for the NGPA "tight sands" incentive price, the sale of program gas had to be governed by a negotiated price in the gas purchase contract agreed to by the gas producer (Exploration), the pipeline purchaser (CIG) and CIG's customers. The FERC ruled that gas purchase contract amendments between Exploration and CIG did not satisfy this requirement; therefore, there was no such qualified negotiated contract price and "tight sands" incentive prices under NGPA Section 107 were unavailable. Instead, the lower regulated prices under NGPA Sections 102 and 103 prices were the highest prices permitted.

15. The FERC in Order 306 further ordered CIG and Exploration to file a refund report specifying in part the difference between the NGPA Section 107 "tight sands" prices charged by Exploration to CIG and passed through to CIG's customers and the NGPA Sections 102 and 103 new gas prices actually permitted. See 44 F.E.R.C. at ¶ 61,023.

16. Prior to the scheduled filing of the refund report required by Order 306, Exploration, CIG and CIG's customers who were parties to the 1973 Stipulation entered into a settlement of all claims. Exploration and CIG agreed to refund excess payments they had received, plus interest, as provided in the settlement, to

CIG's customers. This settlement was submitted to the FERC for its approval.

17. On August 1, 1989, the FERC issued an order which modified the Settlement Agreement to require an $89,000,000 cash refund in four equal annual payments with interest from the date of the Order. See 48 F.E.R.C. ¶ 61,155.

18. By application of the Tax Commission's Rule 10P for the years at issue, based upon FERC-ordered prices (as distinguished from the "tight sands" prices Exploration had actually charged), Exploration's assessments for 1981 through 1986 should have been lower, as shown in Exhibit 1 attached.

19. By applying Uintah County's tax rate for the years at issue to the appropriate assessments shown in Exhibit 1, Exploration overpaid its ad valorem taxes to Uintah County in the amount of $1,452,536.04, as further illustrated in Exhibit 1.

20. On August 4, 1989, Parsons Behle & Latimer on behalf of Exploration wrote the then sitting County Commissioners and County Attorney informing them of FERC Order No. 306 and informing them that Exploration "would be entitled to a refund or a recoupment of ad valorem taxes paid from 1981 to 1986 based upon an erroneous interpretation of the NGPA pricing provisions." A copy of this letter is attached as Exhibit 2.

21. On August 31, 1989, CIG, Exploration, and the City of Colorado Springs requested reconsideration of the August 1, 1989

Order. This request was denied, and sometime in late 1989, the August 1, 1989 FERC Order became a final non-appealable Order.

22. On June 6, 1991, Parsons Behle & Latimer, on behalf of Exploration, made a formal written demand upon the then sitting County Commissioners and County Attorney, calling their attention to the August 4, 1989 letter referenced above, and making a "formal demand" that the County pay Exploration $1,456,814.68,[1] with interest, as a result of overpaid taxes. This letter specifically referenced Utah Code Ann. § 59-2-1321 (1990), which provides for the refund by a county of ad valorem taxes "erroneously or illegally collected." A copy of this letter is attached as Exhibit 3.

23. On July 5, 1991 Exploration filed a Complaint against the County, its commissioners, certain county officers and the Tax Commission seeking recovery of overpaid ad valorem taxes.

24. By September 17, 1991 Exploration and CIG had repaid $89,000,000 with interest to CIG's customers as ordered by the FERC.[2]

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[1] The difference between the $1,456,814 demanded in the August 4, 1989 letter and the $1,452,536 shown in Exhibit 1 is due to minor corrections in the computation.

[2] This Statement of Facts repeats or summarizes those facts found by the FERC in Opinion 306, whose official citation is 44 FERC 61,012. A copy of Opinion 306 is attached. In some instances, this Statement of Facts includes a specific reference to the FERC opinion. In addition, the Statement of Facts is supported by the Affidavits of Kirk W. Weinert and Robert A. Shaw, Jr.

DISCUSSION

I. AD VALOREM TAXES ON EXPLORATION'S PROPERTY FOR THE YEARS 1981 THROUGH 1986 WERE ERRONEOUSLY ASSESSED.

Utah Code Ann. § 59-5-57 (1986) provides that lands containing underground gas rights shall be assessed based upon their reasonable fair cash value. For the years at issue, Rule R884-10P-1 of the Administrative Rules of the Utah State Tax Commission ("Rules") established a mandatory method for assessing underground rights in land containing gas deposits. That rule required that the taxable value of the underground gas rights shall be calculated based upon proceeds from the sale of gas production from the property during the calendar year prior to the date of assessment. See Rule R884-10P-1.B.4. (1987). Applying the rule, the Tax Commission determined the fair market value of these gas properties for the years at issue by multiplying the prior years' proceeds by a specified factor. A copy of Rule 10P is attached as Exhibit 4.

During the years in question, Exploration's property was erroneously assessed because the Tax Commission based its assessments on the proceeds Exploration originally received from its customer, CIG. In 1989, Exploration was ordered to refund portions of the proceeds it had received pursuant to Opinion 306. Consequently, Exploration's assessments were overstated.

II. **THE ERRONEOUSLY COLLECTED TAXES MUST BE REFUNDED TO EXPLORATION PURSUANT TO UTAH CODE ANN. § 59-2-1321 (1993).**

Exploration's First Claim for Relief is based upon Utah Code Ann. § 59-2-1321 (1993), which provides in part:

> Any taxes, interest, and costs paid more than once, or erroneously or illegally collected, may, by order of the county legislative body, be refunded by the County Treasurer, . . .[3]

This statute is virtually identical to Utah Code Ann. §59-10-14 (1954), applicable during the tax years in question.

In Utah Parks Company v. Iron County, 380 P.2d 924 (Utah 1963), the Utah Supreme Court held, in construing the language of former Section 59-10-14 (1954), that (1) an action in District Court would lie under the Declaratory Judgment Act (Utah Code Ann. § 78-33-1 et seq.) to review a county's refusal to refund erroneously paid taxes; and (2) a county may not refuse to refund erroneously assessed or collected taxes, despite Section 59-2-1321's use of the word "may." See also, Atlantic Richfield Company v. Board of County Commissioners, 569 P.2d 1267 (Wyo. 1977) (tax refund statutes are not discretionary). In Utah Parks, the Court noted that the taxpayer had paid the tax without protest, but that fact did not affect its decision.

Many other jurisdictions have statutes similar to Utah Code Ann. § 59-2-1321 (1993) which provide for refunds of taxes

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[3] A copy of Section 59-2-1321 is attached as Exhibit 5.

erroneously or illegally assessed or collected. These statutes exist alongside statutes that permit taxpayers to challenge assessments prior to the time taxes are due. Consequently, statutes providing for refunds of erroneously collected taxes are held to create substantive rights for taxpayers in addition to those statutes providing for challenges to assessments. See City and County of Denver v. Athmar Park Building Co., 378 P.2d 638, 639 (Colo. 1963) (legislature did not intend merely to duplicate remedies available in administrative procedures by providing statute allowing refunds of erroneously paid taxes); Petition of Felton, 316 P.2d 1064, 1067 (Idaho 1957); Barker Lumber Co. v. Genoa City, 78 N.W.2d 893 (Wis. 1956); City of Jackson v. DeSoto, Inc., 350 S.2d 686 (Miss. 1977).

This general rule is consistent with the relief which Exploration seeks pursuant to Utah Code Ann. § 59-2-1321 (1993). The taxes in question were erroneously collected because they were based upon proceeds that were later ordered to be refunded by Exploration. Exploration did not know, nor could it have known when it paid the taxes, that it would ultimately be required to refund a portion of the proceeds on which the taxes were based; and that, consequently, the taxes were being erroneously collected. Although the Utah Code includes statutes that provide for challenges to an assessment before payment of taxes are due, those statutes do not apply to Exploration because no one could have

known at the time the taxes were paid that, ultimately, such payment would be erroneous. As in other jurisdictions having similar statutes, the Utah Legislature included Section 59-2-1321 in the Utah Code in addition to those statutes permitting challenges to assessments before the taxes are due. Clearly, the legislature intended to create additional taxpayer rights beyond a traditional challenge to tax assessments. A case with facts similar to Exploration's is Atlantic Richfield Co. v. Bd. of County Commissioners, 569 P.2d 1267 (Wyo. 1977), in which the plaintiff ("Arco") produced oil and gas from federal lands within the boundaries of Wyoming. Arco paid a flat royalty rate of 12½% of production to the federal government. Arco then paid taxes to the county in which the wells were located on the remaining 87½% of production. Arco followed this procedure for the years 1949 through 1971.

In 1961, the federal government demanded that Arco pay an additional royalty on certain gas produced, retroactive to the first production of those gases. After ten years of litigation, the United States Tenth Circuit Court of Appeals determined that Arco was required to pay the additional royalty. After the Tenth Circuit Court's opinion was issued, Arco filed suit for a credit on its tax account upon a tax refund statute similar to Utah Code Ann. § 59-2-1321 (1993) because of the increased federal royalty payments.

The Wyoming Supreme Court agreed that Arco was entitled to a credit. The court noted that the statute upon which Arco claimed relief was specifically intended to rectify the problem in which taxpayers made a payment that, at the time of assessment and payment of the tax, appeared to be proper, but later is determined to be illegal or erroneous.

That is exactly the situation in this case. When Exploration paid its ad valorem taxes to Uintah County, it did so under the good faith assumption that the proceeds it reported to the Tax Commission for calculation of an assessment under Rule 10P were accurate. Subsequently, when the FERC determined that the proceeds were excessive and that Exploration must refund a portion of those proceeds, the tax assessments and tax payments became erroneous.

Consequently, for the defendants to argue that Exploration's claim should be barred because it did not timely protest its assessments is illogical. Exploration did not protest the assessment before June 1st of each tax year at issue, nor did it pay ad valorem taxes under protest, because it was believed (erroneously) that the assessments were correct. As the Wyoming Supreme Court stated in Atlantic Richfield, such an argument, as the defendants here advance, would "be to say the taxpayers, even though they have paid an illegal or erroneous tax, are without remedy in those circumstances where, at the time of assessment and payment, the tax appeared to be proper but was later determined to

be illegal or erroneous." Atlantic Richfield at 1272. Under Utah Parks, Exploration's erroneously paid taxes must be refunded.

III. EXPLORATION HAS TIMELY ASSERTED ITS REFUND CLAIM.

A. Exploration's refund claim is not restricted by a statute of limitations.

In Atlantic Richfield, the Wyoming Supreme Court held that the tax refund statute was not restricted by a statute of limitations, although the legislature could provide one if it so desired. Similarly, the Utah statute authorizing tax refunds is not restricted by a statute of limitations. By contrast, the Utah Code includes express time limitations for taxpayer challenges to assessments. The Utah Legislature could have imposed a time limitation upon tax refund claims, just as it imposed a time limitation upon challenges to tax assessments, but it did not do so. The presumption is that the legislature's decision not to impose a statute of limitations for actions arising under Section 1321 was not an oversight, but was intentional. See Johnson v. Gallegos Construction Co., 785 P.2d 1109 (Utah 1990).

Taxing statutes must be construed strictly against the taxing authority and in favor of the taxpayer. See Gould v. Gould, 245 U.S. 151, 153 (1917); Superior Soft Water Co. v. State Tax Commission, 843 P.2d 525, 529 (Utah Ct. App. 1992). In so constructing Section 1321 against the taxing authority, there is no statute of limitations defense available to defendants.

B. Assuming, arguendo, a statute of limitations applies to actions brought under Section 1321, the defendants have not pled a statute of limitations defense.

Even if the statute of limitations defense is available to defendants, they have not pled such a defense. Although the Tax Commission's Answer to Exploration's Complaint asserts a number of affirmative defenses, it does not assert a statute of limitations defense. The Tax Commission's Answer alleges that Exploration's Complaint was not "timely filed." This is insufficient. Instead, the applicable statute of limitations must be pleaded as an affirmative defense in a responsive pleading, or it is waived. Tygeson v. Magna Water Co., 375 P.2d. 456 (Utah 1962). See also Hartwell Corp. v. Smith, 686 P.2d 79 (Idaho Ct. App. 1984). Consequently, under Rule 12(b) of the Utah Rules of Civil Procedure, the Tax Commission waived any statute of limitations defense it could have asserted, unless an amended pleading, asserting the defense, is allowed under Rule 15(a) of the Utah Rules of Civil Procedure.[4]

A similar conclusion follows as to the County's Answer. While the County pleads a statute of limitations defense under Section

---

[4] While Rule 15 tends to favor granting leave to amend, neither defendant has filed a motion to amend in over two years since Exploration filed its Complaint, even though Exploration specifically alleged Section 59-2-1321 as the basis of its claim. Under such circumstances, leave to amend would, appropriately, be denied. See Kelly v. Utah Power and Light, 746 P.2d 189 (Utah Ct.App. 1987).

78-12-31, this statute establishes a six-month period in which a taxpayer may file suit against an officer of the County for recovery of taxes paid under protest. This is obviously the wrong statute because (1) Exploration did not pay its taxes under protest and did not file suit under Sections 59-1-301 or 59-2-1327; and (2) Exploration also sued Uintah County, (as opposed to a county officer) which would have triggered a four-year statute of limitations for recovery of taxes paid under protest. See Stevensen v. Monson, 856 P.2d 355 (Ut. Ct. App. 1993).

C. Assuming, arguendo, that a limitations defense applied, and was pled, Exploration's claim would still not be barred since its Complaint was filed within three years after the FERC issued Opinion 306.

Even if Exploration's refund claim is governed by a statute of limitations, the claim was timely asserted. The Utah statute of limitations that most closely fits this fact situation is Utah Code Ann. § 78-12-26 which sets a three-year limitation for:

> An action for relief on the ground of fraud or mistake; except that the cause of action in such case does not accrue until discovery by the aggrieved party of the facts constituting the fraud or mistake.

In Davidson Lumber v. Bonneville Investment, Inc., 794 P.2d 11, 19 (Utah 1990), the Utah Supreme Court reaffirmed its general policy that a "statute of limitations commenced to run when the cause of action accrues." See also Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985). The court in Davidson also explained

that accrual of a cause of action occurs "when all elements of a cause of action come into being." Id. See also State Tax Commission v. Spanish Fork, 99 Utah 177, 100 P.2d 575 (1940). In American Tierra Corp. v. City of West Jordan, 840 P.2d 757, 761 (Utah 1992), the court held that "The correct view [as to when a statute of limitations begins to run] is that the limitation period begins to run as of the date on which the action could have been maintained to a successful conclusion." (Emphasis added.)

In this case, the elements of a cause of action under Section 59-2-1321 did not accrue until Exploration could definitively establish that the Tax Commission's assessments of Exploration's property for 1981 through 1986 were "erroneous" and that the taxes paid on such assessments were "erroneously" collected. At the earliest, that date would have occurred on July 7, 1988, when the FERC issued Opinion 306, ordering Exploration to refund the NGPA "tight sands" prices charged by Exploration.

This conclusion necessarily follows for at least two reasons. First, tax assessments are presumptively correct and will be conclusive unless and until the taxpayer demonstrates otherwise in an appropriate forum. See Rule R861-1-7A. In order to demonstrate that the assessment was erroneous, a taxpayer must show that the original assessment was in error and must provide evidence of the proper assessment. In this case, Exploration could not have shown

that the original assessment was incorrect, nor could it have provided evidence as to the proper assessment until the FERC issued Order 306 and approved the settlement fixing the amount of the refunds.

Second, Utah case law holds that no tax or assessment can exist so as to become a lien upon real property until the amount thereof is ascertained and determined. See Gillmor v. Dale, 26 Utah 372, 75 P. 932 (1904); Utah Parks Company, supra at 925. Therefore, there can be no "erroneous" assessment, and no "erroneously" collected taxes until the specific amount of taxes which the County over collected (i.e., $1,452,536) can be definitively established. Otherwise, there is, by definition, no "erroneous" payment or assessment. See Atlantic Richfield, 569 P.2d at 1273 ("It was only after the federal appellate court rendered its decision that the royalties were due . . . that anyone could say that the tax was . . . erroneously assessed or collected").

Therefore, the earliest date on which Exploration's cause of action could have accrued under Section 59-2-1321 was July 7, 1988, the date the FERC issued Order 306 which held that "tight sands" incentive prices were not available to Exploration. Exploration filed this action on July 5, 1991. Clearly, Exploration's Complaint against the Tax Commission and the County was filed within three years from the date the FERC issued Opinion No. 306 or

the dates the FERC took subsequent action. Consequently, even assuming arguendo that a statute of limitations is applicable to an action brought pursuant to Section 1321 (Section 1321 is not restricted by a limitations period), Exploration's claim would not be barred.

CONCLUSION

Based upon the facts and discussion presented above, Exploration is entitled to an Order granting its Motion for Partial Summary Judgment and for a declaration that the Tax Commission has erroneously assessed Exploration's property and that the County is liable to Exploration for overpaid ad valorem taxes for the years 1981 through 1986.

DATED this 27th day of September, 1993.

LAWRENCE E. STEVENS
MAXWELL A. MILLER
K. C. JENSEN
of and for
PARSONS BEHLE & LATIMER
Attorneys for Exploration

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 1993, I caused to be mailed, first class, postage prepaid, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**, to:

Bill Thomas Peters
Attorney for Uintah County
310 South Main, Suite 1100
Salt Lake City, Utah 84101

Joseph T. Dunbeck, Jr.
Assistant Attorney General
Attorney for Utah State Tax Commission
36 South State Street, Suite 1100
Salt Lake City, Utah 84111

Harry H. Souvall
Uintah County Attorney
1532 East 200 North
Vernal, Utah 84078

EXHIBIT 1

306 AD VALOREM TAX RECOVERY PROJECT

EXHIBIT 2

PARSONS BEHLE & LATIMER LETTER DATED

AUGUST 4, 1989 TO UINTAH COUNTY COMMISSION

LAW OFFICES

PARSONS, BEHLE & LATIMER

A PROFESSIONAL CORPORATION

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OF COUNSEL
DALLIN W. JENSEN
LAWRENCE R. BARUSCH
MAXWELL A. MILLER
RONALD S. POELMAN

August 4, 1989

Nyle Bigelow
Jim Reidhead
Glen McKee
Uintah County Commissioners
147 East Main Street
Vernal, UT 84078

Alvin G. Nash
County Attorney
147 East Main Street
Vernal, UT 84078

Re: Meeting with CIG Exploration, Inc.
on August 10, 1989 at 2:00 p.m.

Gentlemen:

This letter will confirm our understanding that representatives of CIG Exploration, Inc. ("CIGE") have a meeting with you August 10, 1989 at 2:00 p.m. in your offices. The purpose of this meeting is to discuss the impact of a recently issued order from the Federal Energy Regulatory Commission ("FERC") setting the price of various categories of natural gas upon Uintah County.

Colorado Interstate Gas Company ("CIG") and CIGE have been directed by the FERC to refund to CIG's customers revenues collected for prices received under Section 107 of the Natural Gas Policy Act which exceed FERC's determination of the maximum price available to the companies under a Gas Search Program instituted in 1974.

In general, CIGE was allowed under the Gas Search Program to charge area rate prices in excess of the otherwise then-maximum price for former company owned production. Revenues derived from the price differential were to be dedicated to exploration for additional gas reserves. Newly discovered gas also qualified for the area rate price. The history of the Gas Search Program is detailed in Edward Turner Davis, Jr., et al. v. CIG Exploration, Inc., 789 F.2d 328 (5th Cir. 1986), a copy of which is enclosed.

On July 7, 1988, the FERC issued opinion number 306, which determined that certain tight sands and deep gas produced under the Gas Search Program could not qualify for incentive pricing under NGPA Section 107(c)(5) or for deep gas pricing under NGPA Section 107(c)(1) and directed that the excess amounts collected for such gas be refunded.

CIG and CIGE, and most of the other parties involved in the proceeding before FERC requested a rehearing of opinion number 306. However, the FERC, on rehearing disagreed with all CIG's arguments, and opinion 306A affirmed opinion 306 in requiring CIG and CIGE to refund the amounts collected in excess of those prices allowed by the Settlement Agreement of 1973, as interpreted by the FERC.

On December 29, 1988, an agreement in concept was reached among CIGE, CIG and its customers including the Public Service Company of Colorado to settle all lawsuits, dismiss all appeals, and resolve other issues arising as a result of improper pricing of gas under the 1973 agreement. On August 1, 1989, the FERC issued an order approving the settlement with modifications.

For further detail, you may wish to consult Opinon No. 306, 306A, a digest of those opinions, and the FERC Order approving the settlement with modifications, copies of which I have enclosed.

As a result of the FERC order establishing prices retroactively for certain natural gas wells located in Uintah County, CIGE would be entitled to a refund or a recoupment of ad valorem taxes paid from 1980 to 1987 based upon an erroneous interpretation of the NGPA pricing provisions. The amount of potential recoupment for ad valorem taxes paid since 1980 approximates $1.45 million, which figure is calculated on the enclosed schedule.

Three representatives from CIGE, former Governor Scott Matheson and I would like to discuss with you on August 10, 1989 the procedures for recoupment of these overpaid taxes in a manner that is least burdensome to Uintah County.

If you have any questions or comments after having digested the enclosed material, please contact me, either at the address and telephone number noted above or on August 10, 1989 at the offices of John Beaslin, 185 N. Vernal Ave. #1, Vernal, Utah, (801) 789-1201.

Thank you for your cooperation in this matter.

Yours sincerely,

Maxwell A. Miller

MAM:br
Enclosures

EXHIBIT 3

PARSONS BEHLE & LATIMER LETTER DATED

JUNE 6, 1991 TO UINTAH COUNTY COMMISSION

FERC 306 AD VALOREM TAX RECOVERY PROJECT

Tax Year	Original Assessment	Revised Assessment	Tax Rate	Original Tax	Revised Tax	Difference
1981	$ 9,148,930	$ 8,667,432	0.05334	$ 488,003.93	$ 462,320.80	$ 25,683.13
1982	$21,037,232	$14,321,394	0.03974	$ 836,019.60	$ 569,132.23	$ 266,887.37
1983	$30,542,452	$17,450,752	0.04343	$1,326,458.69	$ 757,886.16	$ 568,572.53
1984	$14,089,510	$ 9,268,424	0.04715	$ 664,320.40	$ 437,006.21	$ 227,314.19
1985	$25,189,491	$18,200,134	0.04880	$1,229,247.16	$ 888,166.54	$ 341,080.62
1986	$63,573,252	$61,343,880	0.01032	$ 655,821.67	$ 632,823.47	$ 22,998.20
TOTAL	$163,580,867	$129,252,016		$5,199,871.45	$3,747,335.41	$1,452,536.04

75184

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RONALD S. POELMAN

June 6, 1991

Glen McKee
Lorin Merrell
Max Adams
Uintah County Commissioners
147 East Main Street
Vernal, Utah 84078

Harry Souvall
Uintah County Attorney
147 East Main Street
Vernal, Utah 84078

Re: Demand for Refund of Overpayment of Ad Valorem Taxes From 1980 to 1987

Gentlemen:

Our firm has been retained by CIG Exploration, Inc. ("CIGE") to assist it in recovering excessive ad valorem taxes which it paid to Uintah County for the years 1980 through 1987, in the amount of $1,456,814.68. This letter is a formal demand for payment.

This matter previously was called to your attention by my letter of August 4, 1989, a copy of which I enclose for your convenience, together with a copy of Davis v. CIGE and Order 306 referenced in the August 4, 1989 letter. Also, on August 10, 1989, representatives of CIGE and Parsons Behle & Latimer, including Steven P. Williams and Robert A. Shaw for CIGE and Scott M. Matheson and myself from Parsons Behle & Latimer, met with Nyle Bigelow, James Reidhead and Glen McKee, then the Uintah County Commissioners, and Alvin G. Nash, who was then the Uintah County Attorney. At that meeting, the background of CIGE's ad valorem tax refund claim was discussed.

In my August 4, 1989 letter and at our meeting, CIGE described a proceeding before the Federal Energy Regulatory Commission ("FERC") involving the propriety of the prices CIGE charged for natural gas it produced from 1970 through 1987 in Uintah county and elsewhere. The FERC determined in July 1988 that those prices were unlawful and ordered CIGE to make refunds to its pipeline purchaser. Subsequently, in December, 1988 CIGE and the other parties to that case agreed to settle, which settlement was finally approved by the FERC by its Order Denying Rehearing issued July 9, 1990, a copy of which is enclosed. This order has become final and non-appealable, and refunds have been made pursuant to its provisions.

As a result of these refunds ordered by FERC, the ad valorem taxes paid by CIGE in Uintah County in the years 1980 through 1987 exceed the amount actually due by an aggregate amount of $1,456,814.68. Enclosed is a schedule which provides the details of this calculation.

Please accept this letter as CIGE's formal demand that Uintah County, Utah pay CIG Exploration, Inc. $1,455,814.68, by delivery of such amount to its attorneys, Parsons Behle & Latimer, in the form of a cashier's check, at the address indicated on this letter, directed to the attention of the undersigned, no later than Friday, July 5, 1991. This demand is being made pursuant to Utah Code Ann. § 59-2-1321 (1990), which provides for the refund by Uintah County of ad valorem taxes erroneously or illegally collected. If this payment is not received, CIGE will pursue all legal remedies to collect such amount.

CIGE is willing at all times prior to and including July 5, 1991 to negotiate a settlement with Uintah County including a recoupment of these ad valorem tax overpayments through reduced future taxes. CIGE is also willing to meet with you prior to July 5, 1991 to answer any questions you may have regarding this claim. Please feel free to contact me at the address and telephone number shown above.

Thank you for your cooperation in this matter.

Yours Sincerely,

Maxwell A. Miller

Enclosures
MAM/060691A

EXHIBIT 4

TAX COMMISSION RULE

R884-10P-1, B.4. (1987)

G. The income indicator of value shall be computed as follows:

1. annual net revenue, both net losses and net gains, from the mining property for each of the immediate past five years (or years in operation if less than five years), shall be adjusted by an appropriate index of inflation;

2. average annual net revenue is the sum of the values obtained above divided by the number of years; i.e., five or less;

3. the average annual net revenue is divided by the capitalization rate.

H. Reporting shall be on a calendar or fiscal year basis consistently followed, with Tax Commission approval.

I. Valuation of currently producing nonmetalliferous mining properties.

1. The reasonable fair cash value of productive, nonmetalliferous mining property shall be determined by the capitalized net revenue method or such other valtation method that the Tax Commission believes to be reasonably determinative of the property's fair cash value.

2. In no event shall a tax under this section be less than the tax on new mines or nonproducing, existing mines as determined below.

J. Valuation of new mines and nonproducing, existing mines.

1. All lands and improvements shall be assessed at fair market value.

2. Tangible personal propert y shall be assessed at reasonable fair cash value as established at the local assessment level.

1987 59-2-210

R884-08P. Property Tax Withholding For Uranium and Vanadium Mines Pursuant to Utah Code Ann. §§59-2-210 and 59-2-211

R884-08P-1. Property Tax

R884-08P-1. Property Tax

A. A list of mine owners and operators who have made lump sum security deposits with the Tax Commission will be furnished annually by the Commission to any person, mill, buying station, or other legal entity receiving uranium or vanadium ore mined, produced, or received from within Utah.

B. If not on the Tax Commission's original, or subsequently updated list, the security deposit shall be obtained through withholding as provided below:

1. Any person, mill, buying station, or other legal entity receiving uranium or vanadium ore mined, produced, or received from within Utah shall withhold 4 percent (or such higher amount as determined by the Tax Commission) of the gross proceeds due to the mine operators or owners.

2. All amounts withheld shall be remitted to the Tax Commission by the last days of April, July, October, and January for the immediately preceding calendar quarter, on forms and in a manner as set forth by the Tax Commission.

3. Not later than the last day of February, the owners or operators of each uranium and vanadium mine shall be provided with a statement from the Tax Commission showing all security deposit amounts withheld from their gross proceeds during the previous calendar year.

4. The Tax Commission shall provide the county treasurers with a list of all uranium and vanadium producers who have had security deposit amounts withheld. The county treasurers shall then forward to the Tax Commission an accounting of the amount of taxes due from each taxpayer on the Tax Commission's list.

5. Once all county treasurers have responded, the Tax Commission shall forward to each county treasurer the taxes due, or the pro rata portion thereof, to the extent said taxes have been withheld and remitted to the Tax Commission.

a. Any amount withheld in excess of the total taxes due to all counties shall be refunded to the appropriate producer by the Tax Commission.

b. If the amount withheld is not sufficient to pay the full amount of taxes due, the county treasurers shall collect the balance of said taxes directly from the producers.

1987 59-2-210, 59-2-211

R884-10P. Taxation of Underground Rights In Land That Contains Deposits of Oil or Gas Pursuant to Utah Code Ann. §§59-2-219, 59-2-210, and 59-2-211

R884-10P-1. Property Tax

R884-10P-1. Property Tax

A. Definitions.

1. "Person" as defined in Utah Code Ann. §59-5-101(1).

2. "Unit" as defined in Utah Code Ann. §59-5-211(2).

3. "Working interest owner" as defined in Utah Code Ann. §59-5-101(10)(c).

4. "Unit operator" means a person who operates all of the producing wells in a unit.

5. "Independent operator" means a person operating an oil or gas producing property not in a unit.

6. One person can, at the same time, be a unit operator, a working interest owner, and an independent operator and must comply with all requirements of this rule based upon his status in the various situations.

B. Assessment Procedures.

1. Underground rights in lands containing deposits of oil or gas and tangible property used in the operation of such rights, are subject to assessment by the Tax Commission.

2. These rights and the tangible property used therewith shall be assessed in the name of the unit operator, the independent operator or other person as the facts may warrant.

3. The taxable value of the underground oil rights shall be 400 percent of the proceeds from the sale of oil production from each such property during the calendar year prior to the date of assessment, less applicable exempt federal, state, indian royalties, and windfall profits tax.

4. The taxable value of the underground gas rights shall be 400 percent of the proceeds from the sale of gas production from each such property during the calendar year prior to the date of assessment, less applicable exempt federal, state, and Indian royalties.

5. All other tangible property shall be valued at fair cash value as determined by the Tax Commission.

C. Assessment Credits Greater Altamont/Bluebell Field

1. Oil properties in the Greater Alta-

mont/Bluebell field shall receive a credit of 20 percent. All qualified property shall therefore be valued at 80 percent of the taxable value. This credit does not apply to gas production.

2. The Greater Altamont/Bluebell field is actually comprised of three separate fields. These include Altamont field, Bluebell field, and Cedar Rim field as recorded by the Utah Division of Oil, Gas and Mining.

3. Secondary recovery credit for oil wells.

(a) A ten percent credit shall be granted to oil properties engaged in secondary recovery. All qualified property shall therefore be valued at 90 percent of the taxable value. This credit does not apply to gas production.

(b) This credit is not allowed until after one full year of secondary recovery operations by the producer claiming the exemption.

4. After assessment and application of the appropriate credits, the taxable values for the oil properties and the gas properties may be summed to arrive at the total taxable value of the property.

D. Collection by Operator.

1. The unit operator may make a reasonable estimate of the ad valorem tax liability for a given period and may withhold funds from amounts due to royalty and other fractional interest owners for such period. The amount shall be sufficient to insure payment of the ad valorem tax on each fractional interest according to the estimate made.

a. If an unit operating agreement exists between the unit operator and fractional working interest owners, the unit operator may withhold or collect the tax according to the terms of such agreement.

b. In any case, the unit operator and the fractional interest owner may make such agreements or arrangements for withholding or otherwise collecting this tax as are mutually satisfactory. This may be done whether or not such practice is consistent with the preceding paragraphs so long as all requirements of the law are met.

c. The unit operator shall compare the amount withheld to the taxes actually due, and return any excess amount to the fractional interest owner within 60 days after the delinquent date of the tax. At the request of the fractional interest owner such excess may be retained by the unit operator and applied toward the fractional interest owner's tax liability for the subsequent year.

2. The penalty provided for in Utah Code Ann. §59-2-210 and 59-2-211(2) paragraph four is intended to insure collection by the county of the entire tax due. Any unit operator who has paid this county-imposed penalty, and thereafter collects from the fractional interest holders any part of their tax due, may retain such funds as reimbursement against the penalty paid.

3. Interest on delinquent taxes will be assessed as set forth in Utah Code Ann. §59-2-1325.

4. Each unit operator may be required to submit to the Tax Commission a listing of all fractional interest owners and their interests upon specific request of the Tax Commission. Working interest owners, upon request, shall be required to submit similar information to unit operators.

1987 59-2-219, 59-2-210, 59-2-211

R884-14P. Historic Preservation Easements Pursuant to Utah Code Ann. §§63-18A-1 through 6

R884-14P-1. Property Tax

R884-14P-1. Property Tax

A. Appraisals of historically significant real property and structures burdened with a preservation easement will acknowledge the easement when determining the property's value.

B. When the easement is recorded with the county recorder, the property owner of record shall submit to the county assessor and the Tax Commission a notice containing the:

1. owner's name;

2. address of the property; and

3. serial number of the property.

C. The county assessor shall review the property and incorporate any indicated value change in the following year's assessment roll.

1987 63-18A-1 thru 63-18A-6

R884-16P. Assessment of Interlocal Cooperation Act Project Entity Properties Pursuant to Utah Code Ann. §11-13-25(4)

R884-16P-1. Property Tax

R884-16P-1. Property Tax

A. The Tax Commission shall determine the fair market value of the property of each project entity.

Fair market value shall be based upon standard appraisal theory and shall be determined by correlating estimates derived from the income and cost approaches to value described below:

1. The income approach to value requires the estimation of an income stream and a capitalization rate. The income stream may be based on recognized indicators such as average income, weighted income, trended income, present value of future income streams, performance ratios, and discounted cash flows. The estimations of income stream and capitalization rate shall be derived from the data of other similarly situated companies. Similarity shall be based on factors such as location, fuel mix, customer mix, size and bond ratings. Estimates may also be imputed from industry data generally. Income data from similarly situated companies will be adjusted to reflect differences in governmental regulatory and tax policies affecting them.

2. The cost approach to value shall consist of the total of the property's net book value of plant inservice, construction work in progress, and materials and supplies. This total shall then be adjusted for obsolescence if any.

This rule is retroactive to the lien date of January 1, 1984.

1987 11-13-25(4)

R884-19P. Appraiser Certification Program Pursuant to Utah Code Ann. §§59-2-701 and 59-2-702

R884-19P-1. Property Tax

EXHIBIT 5

UTAH CODE ANN. § 59-2-1321 (1993)

ting to revenue, the attorney general shall prosecute the delinquent officer. 1988

59-2-1314. Informalities and time prescribed for action - Effect on validity of tax.

No assessment or act relating to assessment or collection of taxes is illegal on account of informality or because the assessment or act was not completed within the time required by law. 1988

59-2-1315. Disposition of fines and forfeitures.

The fines and forfeitures incurred by violation of any of the provisions of this chapter shall be paid into the treasury for the use of the county where the property is located. 1988

59-2-1316. Annual settlements between county assessor, county treasurer, and county auditor.

Every county assessor and county treasurer shall annually, on the first Monday in January, make a settlement with the county auditor of all transactions connected with the revenue for the previous year, and every county treasurer, on the expiration of the treasurer's term of office, shall make the settlement. 1988

59-2-1317. Index of property owners - Tax notice.

(1) Upon receipt of the assessment roll, the county treasurer shall index the names of all property owners shown by the assessment roll. The commission shall prescribe a form of index which shall be uniform in all the counties throughout the state.

(2)(a) The treasurer shall proceed to collect the taxes and furnish to each taxpayer, except those taxpayers under Sections 59-2-1302 and 59-2-1307, by mail, postage prepaid, or leave at the taxpayer's residence or usual place of business, if known, a notice containing:

(i) the kind and value of property assessed to the taxpayer;

(ii) the street address of the property, where applicable; and

(iii) the amount of tax levied.

(b) The notice shall set out the aggregate amount of taxes to be paid for state, county, city, town, school, and other purposes.

(3) If the property has been preliminarily sold for a prior tax within a period of four years and has not been redeemed, the treasurer shall stamp on the notice "Prior taxes are delinquent on this parcel. Final tax sale pending." The notice shall set out separately all taxes levied only on a certain kind or class of property for a special purpose or purposes, and shall have printed or stamped on it the effective rate of taxation for each purpose for which taxes have been levied, when and where payable, the date the taxes will be delinquent, and the penalty provided by law.

(4) The notice shall be mailed by November 1. The notice shall be in duplicate form and the county treasurer need not mail out a tax receipt acknowledging payment.

(5) After notices have been mailed, the county treasurer shall make available the assessment roll, map books, and statements to the clerk of the county board of equalization. 1990

59-2-1318. Date of payment of property tax - Notation on assessment roll.

The county treasurer shall mark the date of the payment of any tax in the assessment roll opposite the property identification number. 1988

59-2-1319. Receipts for payments - Payment by warrant - Cash payments required - Exceptions.

(1) The county treasurer shall, upon request, give a receipt to the person paying any taxes, specifying the amount of the assessment, the taxes due, the property identification number, and the aggregate amount of taxes paid.

(2) County warrants shall be taken in payment of county taxes, city warrants in payment of city taxes, and school district warrants in payment of school district taxes.

(3) All taxes shall be paid in cash, unless the county treasurer adopts rules otherwise. 1988

59-2-1320. Settlements with county governing bodies.

On the first Monday of March and June, and the second Monday of September and December, the county treasurer shall settle with the county governing body for all moneys collected by the treasurer, and on those days shall deliver to and file in the office of the county auditor a statement under oath showing:

(1) an account of all transactions and receipts since the last settlement; and

(2) that all money collected is in the county treasury. 1988

59-2-1321. Erroneous or illegal assessments - Deductions and refunds.

The county governing body, upon sufficient evidence being produced that property has been either erroneously or illegally assessed, may order the county treasurer to allow the taxes on that part of the property erroneously or illegally assessed to be deducted before payment of taxes. Any taxes, interest, and costs paid more than once, or erroneously or illegally collected, may, by order of the county governing body, be refunded by the county treasurer, and the portion of taxes, interest, and costs paid to the state or any taxing entity shall be refunded to the county, and the appropriate officer shall draw a warrant for that amount in favor of the county. 1988

59-2-1322. Real estate assessed more than once.

If the county treasurer determines that any property has been assessed more than once for the same year, the treasurer shall collect only the tax justly due and report the facts, under affidavit, to the county auditor. 1988

59-2-1323. Undivided interests in property - Interest of delinquent co-owner only to be sold.

The county treasurer shall issue a receipt showing the interest on which taxes are paid to any person paying taxes on an undivided interest in real estate. If any portion of the taxes on the real estate remains unpaid, it is the duty of the treasurer to sell only the undivided interest in the real estate which belongs to the co-owners who have not paid their portion of the tax. 1988

59-2-1324. Taxes to be paid before distribution of estate of a deceased person.

The district court shall require every administrator or executor to pay out of the funds of the estate all taxes due from the estate. No order or decree for the distribution of any property of any decedent among the heirs or devisees may be made until all taxes against the estate are paid. 1988

59-2-1325. Nature and extent of lien - Time of attachment.

A tax upon real property is a lien against the property assessed. A tax due upon improvements upon real property assessed to a person other than the owner of the real property is a lien upon the property and improvements. These liens attach as of

AFFIDAVIT OF KIRK W. WEINERT

AFFIDAVIT

I am Kirk W. Weinert, the Vice President of Ad Valorem Tax and Right of Way for various affiliates of The Coastal Corporation including CIG Exploration, Inc. and Vice President of Coastal States Management Corporation. I have been an employee of The Coastal Corporation or one of its affiliates since 1976. From 1981 to and including 1986, I was an in-house counsel to CIG Exploration, Inc. ("Exploration") and have personal knowledge as to Exploration's involvement in the events described in the Statement of Undisputed Material Facts included in Exploration's Memorandum in Support of its Motion for Partial Summary Judgment filed in Case No. 910800160. I have reviewed Exploration's Statement of Undisputed Material Facts and verify that the same is true and accurate.

Kirk W. Weinert
Signature

Kirk W. Weinert
Print Name of Person Signing

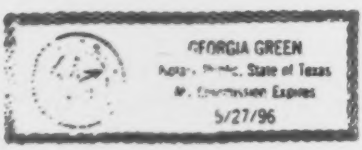
STATE OF TEXAS

COUNTY OF HARRIS

Subscribed and sworn before me this 23rd day of September, 1993.

My Commission expires 5-27-96
Address 9214 Brooktree Ct - Harris County, TX

Georgia Green
Notary Public



AFFIDAVIT OF ROBERT A. SHAW, JR.

AFFIDAVIT

I am Robert A. Shaw, Jr. the Director of the Ad Valorem Tax Department of The Coastal Corporation. CIG Exploration, Inc. is a subsidiary of The Coastal Corporation. I make this affidavit based upon my personal knowledge and/or my review of the business records kept by The Coastal Corporation to which I have access. I am responsible for the annual payment of the property taxes for CIG Exploration, Inc. The tax assessments and payments shown on Exhibit 1 attached hereto are the actual taxes CIG Exploration, Inc. remitted to Uintah County, Utah for the years shown. I have reviewed the payment records in our files to verify this information.

Robert A Shaw Jr.
Signature

Robert A. Shaw Jr.
Print Name of Person Signing

STATE OF TEXAS

COUNTY OF HARRIS

Subscribed and sworn before me this 3rd Day of March, 1993.

My Commission Expires 11/21/93.

P O BOX 4372 - HOUSTON, TX 77210
Address

Randolph F. Hiniat
Notary Public

RANDOLPH F. HINIART
Notary Public, State of Texas
My Commission Expires
11/21/93

FERC OPINION 306

Thomasville	3,535	300	3,835
Total	9,696	590	10,286

Since the proposed sale of natural gas will be made in interstate commerce for resale, it is subject to the jurisdiction of the Commission and to the requirements of subsections (c) and (e) of section 7 of the Natural Gas Act.

By order issued in Docket No. CP70-7-035 (42 FERC ¶ 61,199 (1988)), Southern Natural Gas Company (Southern) was authorized to reduce the contract demand of one of its customers and to reallocate the gas to its customers who elected to receive such gas. South Georgia elected to increase its contract demand from Southern by 590 Mcf of gas per day. In this proceeding South Georgia is proposing to allocate the gas to Americus, Thomasville and Tifton.

Inasmuch as the increased sales will permit Tifton, Americus and Thomasville to maintain reliable natural gas service in their respective service areas, we find that authorization therefor is required by the public convenience and necessity.

After due notice by publication in the *Federal Register* on March 23, 1988 (53 Fed. Reg. 9478), no motions to intervene, notices of intervention, or protests to the granting of the application have been filed.

At a hearing held on June 29, 1988, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, as supplemented, and exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record.

The Commission orders:

(A) A certificate of public convenience and necessity is issued to South Georgia authorizing the increased sale of gas to Tifton, Americus and Thomasville, as described above and in the application.

(B) Grant of the certificate is conditioned upon South Georgia's compliance with Part 154 and paragraphs (a), (c)(3), and (e) of section 157.20 of the Commission's regulations.

[¶ 61,023]

Colorado Interstate Gas Company, a Division of Colorado Interstate Company, Docket No. CP73-184-002;
CIG Exploration, Inc., Docket No. CI73-485-002

Opinion No. 306; Opinion and Order Affirming in Part and Reversing in Part Initial Decision

(Issued July 7, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon and Charles A. Trabandt.

[Note: Initial Decision of the presiding administrative law judge issued July 24, 1985, appears at 32 FERC ¶ 63,033.]

Appearances

William M. Lange, Kirk W. Weinert, William R. Mapes, Jr. and *Bernard A. Foster III* for the Colorado Interstate Gas Company

Robert K. Arnett, Jr. for the CIG Exploration, Inc.

Eugene C. Cavaliere for the Public Utilities Commission of the State of Colorado

George J. Cerrone, Jr. for the City and County of Denver

James R. McCotter and *Charles P. Carpenter* for the Public Service Company of Colorado, Western Slope Gas Company, and Cheyenne Light, Fuel & Power Company

Michael Gianunzio and *Gregory L. Johnson* for the City of Colorado Springs

Peter J. Roidakis, Tom Rattray, Randall S. Rich, Sandra Delude, Demetrios G. Pulas, Jr., Lawrence L. Lebow and *Richard Kelly* for the Staff, Federal Energy Regulatory Commission

[Opinion No. 306 Text]

This proceeding involves exceptions filed to the initial decision of the presiding judge[1] interpreting a 1973 settlement agreement concerning a gas exploration program between Colorado Interstate Gas Company and its affiliates (referred to as CIG unless otherwise indicated) and CIG's customers. The principal issue presented is whether, after passage of the Natural Gas Policy Act of 1978 (NGPA), the pricing provision of the agreement permitted the collection of incentive prices under NGPA sections 102, 103, 107 and 108. The initial decision held that it did not, and determined the price that could be collected. We conclude this was erroneous and reverse.

I. Background

A. The 1973 Agreement

In 1973, CIG was, as were many other pipelines, faced with a serious supply shortage. CIG also had serious problems in financing the exploration for and development of new gas supplies. At that time CIG, as a pipeline producer, received under the Natural Gas Act (NGA), for company-owned production, cost-of-service pricing treatment for its "old" gas (production from leases acquired prior to October 7, 1969) and area rate pricing for "new" gas. Any producing affiliate in 1973 would also receive the same pricing treatment.[2] In 1973, CIG and its customers entered into an agreement and stipulation (the agreement) to provide CIG's customers with new gas supplies. Under the agreement, CIG would transfer its production properties to a new subsidiary, CIG Exploration Inc. (CIGE). CIGE would be permitted to receive the higher area rate rather than the cost-of-service rate for the old gas produced from these properties. In turn CIG was required to expend for exploration, development and production of new gas reserves, a minimum of $50.9 million (the Fund). This sum represented the additional revenues anticipated over a five-year period from charging the area rates prevailing in 1973 as applied to "old" gas, rather than the cost-of-service rate.[3]

The agreement had specific pricing provisions governing the pricing of both "old" and "new" gas. Article II, Section 2 provided that "old" gas would be sold:

> at prevailing area rates (for purposes of this Stipulation and Agreement, unless the context otherwise requires, the term "area rate" shall mean the applicable area rate, or nationwide rate if such should be established, from time to time established by the Commission for gas of comparable quality and vintage) adjusted to recover increases in production taxes or, in the event that area rates should no longer be applicable to the Old Gas (Deregulation), at prices reflecting the area rate in effect immediately prior to Deregulation, escalating at the rate of 1¢ per Mcf for each year subsequent to Deregulation. . . .

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[1] 32 FERC ¶ 63,033 (1985).

[2] In 1974, the Commission in Opinion No. 699-H, 52 FPC 1604, redefined "old" and "new" gas produced by a pipeline or its affiliate. Only company-owned production from a lease acquired prior to October 7, 1969, and drilled from a well spudded prior to January 1, 1973, was considered "old" gas and priced on a cost-of-service basis.

[3] The Fund would also increase pursuant to a specific formula when CIGE dedicated "new" gas to CIG. For "new" gas reserves dedicated by CIGE at a price less than 25¢ per Mcf, CIGE would add 3¢ per Mcf to the Fund; for such reserves dedicated at more than 25¢ the addition to the Fund was 3¢ plus 12½ per cent in excess of 25¢.

The foregoing allowance of area rates for "old" gas was expressly limited by the following provision:

> *provided, however,* that in no event shall the sales price for Old Gas exceed an amount equal to 25¢ per Mcf plus [adjustments].

New gas was subject to the following price condition:

> [A]ll New Gas dedicated to CIG's system shall be sold by Exploration to CIG under life-of-the-field contracts, under terms and conditions reasonable and customary for gas purchase contracts with independent producers relating to reserves of comparable quality, nature and location. Each such contract shall provide for prices not exceeding the applicable area rate prevailing from time to time during the term of the contract [plus specified adjustments] . . . or in the event that area rates should cease to be applicable to such gas either before or after such contract is entered into, shall provide for a price reflecting the area rate in effect immediately prior to Deregulation, escalating at the rate of 1.5¢ per Mcf for each year subsequent to Deregulation, and [adjustments] . . . . Exploration shall not seek certification for any New Gas under the optional certification procedures adopted by the Commission . . . . nor shall it charge rates for any New Gas under any pricing procedure or formula other than as set forth in this Section 7.

The agreement also provided that CIG and CIGE were to wind-up the program within seven years.

The Commission approved the agreement in 1974.[4] The Commission found that the 1973 settlement was "in the public interest," noting that the proposal was similar to other Commission approved programs based upon increased revenues from company-owned production.

The Commission described the arrangement as follows:

> These proposals which establish an exploration and development fund to finance the cost of finding and developing new supplies of natural gas within the United States represent an opportunity for a pipeline company to acquire the lowest cost supply of gas for resale to its customers. In effect, these proposals represent a sharing of the risk of finding and producing new supplies of natural gas by the pipeline company and its customers. While the present settlement agreement is patterned after the adopted proposals in the *Panhandle Eastern*[5] and *Natural* cases,[6] it represents the needs of CIG's customers and reflects their position that they should have a share in all of the valuable minerals which may be found as a result of the expenditure of monies from the Fund.

In describing the pricing arrangement, the Commission stated:[7]

> As in the *Panhandle* case Exploration [CIGE] shall be authorized to sell natural gas produced from the leases acquired from CIG to CIG at the applicable area rate established by this Commission. (This gas is referred to as "Old Gas".) The term "area rate" is defined to include a "nationwide rate" should such rate be established by the Commission. In the event that the price of the Old Gas is not regulated by this Commission, Exploration is contractually authorized to sell the

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[4] *Colorado Interstate Gas Co.*, 51 FPC 74 (1974).

[5] *Panhandle Eastern Pipe Line Company*, 48 FPC 518 (1972).

[6] *Natural Gas Pipeline Company of America*, 50 FPC 368 (1973).

[7] 51 FPC at 78-79.

> Old Gas at the applicable area rate in effect immediately prior to such nonregulation with a 1.0 cent per Mcf per annual escalation and subject to adjustments to cover increased production taxes and royalty payments. The maximum price for the Old Gas is established as 25.0 cents per Mcf before adjustment for production taxes and royalty payments. . . . (footnote omitted.)
>
> * * * *
>
> Sales of New Gas (Natural gas produced from leases acquired through the use of Fund monies) will be made by Exploration to CIG under life-of-the-field contracts at prices not exceeding the applicable area rate (or national rate if such shall be established by the Commission) subject to adjustments. . . . Should the price of New Gas be not regulated, Exploration shall be entitled to sell the New Gas to CIG at the applicable area rate in effect immediately prior to nonregulation with a 1.5 cent per Mcf annual escalation and subject to adjustments for royalty payments and production taxes. . . .

It should be noted that the Commission described "deregulation" in different ways in the two pricing provisions. For old gas, deregulation was said to occur "in the event that the price of old gas is not regulated by this Commission" (emphasis added). However, for new gas, deregulation was defined as "should the price for New Gas be not regulated."

In Ordering Paragraph (E) the Commission provided that:

> (E) Exploration is hereby authorized for a period of five years from the date of this order . . . to price natural gas produced from the Production Properties acquired from CIG at the applicable area rate from time to time established by the Commission for natural gas of comparable quality and vintage, *or at such rate as may lawfully be established in the event that area rates shall not be applicable to natural gas produced from these properties*, instead of the cost of service basis at which such natural gas is now priced by CIG to its customers. (emphasis added.)[8]

B. The NGPA

In 1978 the NGPA sharply curtailed the Commission's authority to set wellhead prices, and Congress established statutory ceiling prices for various categories of gas. These prices were substantially higher than those the Commission had set, but private parties were free to bargain for lower rates. Producers could sell their gas at the NGPA price only if the gas met categorical statutory criteria and had been sold under a contract that authorized, or could be read to authorize, the NGPA price. The question then arose whether area rate clauses, which had been sufficient to supply contractual authorization for price increases under the NGA, would also suffice to permit increases to the NGPA ceiling price.[9]

The Commission addressed this issue in the Order No. 23 rulemaking.[10] In *Pennzoil Company v. FERC*, the court noted that the rulemaking led the Commission to conclude:

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[8] *Id.* at 81.

[9] An "area rate clause" is an indefinite price escalation provision allowable under 18 C.F.R. § 154.93 (1988), which authorizes an escalation in the contract price to the "applicable just and reasonable area ceiling rate."

[10] Order No. 23, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040 (1979); Order on Rehearing of Order No. 23 [7 FERC ¶ 61,152]; Order No. 23-A, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,058 (1979); Order on Rehearing of Order No. 23-A [8

that neither the language of the NGPA nor Commission regulations precluded authorization of NGPA rates through area rate clauses. Nevertheless, the Commission also concluded that it could not dispositively construe all such area rate clauses. Rather, the Commission concluded that it would ascertain and give effect to the contracting parties' intent and that it would not object generally to the parties' reliance on area rate clauses as authority to collect NGPA prices.[11]

Thus, if the parties intended to allow the contract price to increase to the highest relevant ceiling set by regulatory authorities, then the clause would supply the requisite authority to charge the NGPA price. If, on the other hand, the parties merely intended to allow increases to the highest ceiling set by a cost-based methodology as under the NGA ratemaking proceeding, with participation by interested persons and, ultimately, judicial review, then the clause would not suffice to authorize a price rise to the maximum NGPA level.[12]

With the inception of the NGPA, CIG began paying CIGE for "new Gas" at the incentive prices provided under the NGPA. In 1982 Public Service Company of Colorado (PSC), a CIG customer and a party to the 1973 agreement, filed a civil action asserting that CIG had violated the pricing provision by paying the NGPA price. Subsequently, the matter came before the Commission and on March 30, 1984, the Commission issued an order setting this case for hearing to resolve:

(1) Whether the 1973 Settlement authorizes CIG to pay and CIGE to receive the NGPA maximum lawful rates beginning December 1, 1978 for "New Gas" . . .

(2) Whether CIG's final accounting and report, filed on August 25, 1981, is incorrect and therefore requires refunds to be made to CIG's customers; and

(3) Whether the expenditure of Program funds by CIGE for the exploration of natural gas during the two-year wind-up period is a breach of the 1973 Gas Search Settlement Agreement. If the expenditure is determined to be a breach of the Gas settlement, the measure of damages, if any, must be determined.[13]

II. The Initial Decision

The agreement authorized CIG to collect the area rate for new gas but also provided for a specific price in the event of "deregulation". The issue presented is the impact of the NGPA upon the parties' agreement. On the one hand, CIG contended that the area rate authorized escalation to the NGPA prices; on the other hand, its customers asserted that the enactment of the NGPA constituted deregulation, thereby invoking that price provision under the agreement.

The judge found that (1) the agreement and Commission order approving it are "ambiguous" (32 FERC at p. 65,111) and not "determinative of what the parties intended to occur in the NGPA setting" (*Id.* at p. 65,105); (2) the purposes and circumstances of the agreement do not overcome its ambiguity, *Id.*; and (3) the conduct of the parties after the NGPA does not unequivocally indicate any particular interpretation of the agreement (*Id.* at p. 65,121). He further found that the "subjective

(Footnote Continued)

FERC ¶ 61,158]; Order No. 23-B, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,065 (1979); Order on Rehearing of Order No. 23-B, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,073 (1979).

[11] 789 F.2d 1128, 1132 (5th Cir. 1986).

[12] *Independent Oil & Gas Association*, Opinion No. 77, 10 FERC ¶ 61,214, at p. 61,397 (1980).

[13] 26 FERC ¶ 61,422 (1984). The parties agreed that the issues in the civil litigation would be resolved by the Commission.

intentions" of the parties are inconclusive because they "correspond to the conflicting positions taken . . . and therefore do not resolve what was intended" (*Id.* at p. 65,105). He concluded that "there was no meeting of the minds as to what the price would be for 'new' gas if Congress were to establish ceiling prices on an incentive basis." Thus while CIG thought it could pay its affiliate, and charge its customers any "regulated" rate, its customers thought regulated meant "cost-based." *Id.*

In light of the finding of ambiguity, the judge stated that "reference is made back to the Commission and court guidelines on how ambiguous contracts are to be handled." (*Id.*) He held that the "criteria set out in Opinion No. 77 by which the intent of contracting parties is determined are not applicable because of the unique nature of the 1973 Settlement" (*Id.*).[14] The judge concluded that there was an omitted term as to the pricing of new gas under the NGPA, and that it was his function to supply that term on the basis of what was "reasonable," and consistent with relevant case law and the Uniform Commercial Code. This he stated would be based on the following:

> First . . . [the parties] would have agreed to be bound by government regulated prices so long as the regulation was based on costs, and second, if government regulation should lead to incentive pricing, the amount of the price above a price based on costs would be shared according to the contributions made to the Program Fund. (*Id.* at p. 65,105).

The judge determined that it was reasonable, in the context of ratepayer funding, that CIG/CIGE and their customers share in the windfall increment above cost-based rates in the same proportion as their contributions to achieving the windfall. This was because the agreement (Art. II, Sec. 10) provided that CIG's customers would "equitably share in the benefits of . . . New Gas . . . to the extent [they] made possible the [exploration monies]" used to discover the new gas.

The judge found that CIG's customers allegedly contributed sixty percent of the monies to the Fund while CIGE contributed forty percent. Accordingly, a reasonable post-NGPA price was the NGPA section 104 price[15] plus forty percent of the difference between the section 104 price and the maximum incentive NGPA price otherwise available for each category of New Gas sold. Further, if New Gas would qualify for more than one NGPA price, the judge held that the price should be based on the highest incentive price, reduced as above, except for the price of tight sands gas. So long as any incentive price was available, it would govern, with the section 104 pricing becoming applicable only if no other incentive price was available. The judge held that the section 107 "tight sands" price was not authorized because there had not been, as required by the Commission's regulations, any agreement on this price by CIG's customers.[16] The judge ordered that CIG and CIGE file a report showing their refund liability, with interest, and that effective October 22, 1985, CIG was to escrow any difference between the prices chargeable by CIGE under his decision and those that would otherwise be paid to CIGE.

On the other issues, the judge held that the transfer of undeveloped leases from the program fund to CIGE at the end of the program should have been accomplished on

[14] However, he stated in *dicta* that if those criteria were applied, the necessary conclusion is that CIGE was entitled to receive NGPA rates (*Id.* at p. 65,126).

[15] The NGPA section 104 price essentially took the applicable area rate at the time the NGPA was enacted and escalated it by an inflation adjustment factor.

[16] 18 C.F.R. § 271.703 (1986).

the basis of the current market value of the leases rather than cost, as CIG had done (*Id.* at p. 65,137); that CIG had properly priced the 7.7 Bcf of Gas Search reserves dedicated under contracts with third parties, which did not contain the "Deregulation" pricing language required by the 1973 Agreement (*Id.* at pp. 65,138-40); and that the claims against CIG relating to expenditures for surface facilities and the allocation of overhead to the Program Fund were without merit (*Id.* at pp. 65,137-40). Finally, the judge ruled that CIGE had not acted improperly by continuing drilling and lease acquisition activity during the wind-up period (*Id.* at pp. 65,143-46).

III. Position of the Parties

On the major issue in this proceeding, both CIG and its customers contend that the judge erred in establishing the 60/40 ratio. However, they differ on the consequences of reversing the initial decision.

CIG maintains that the criteria of Order No. 77 are applicable, and since the judge found that the agreement met the criteria, the New Gas price could be escalated to the NGPA incentive price.[17] Further, even if the Opinion No. 77 criteria are not applicable, CIG argues that the method used by the judge to determine the reasonable price is erroneous. CIG asserts that if there was no meeting of the minds on the price term, CIG is entitled to receive the "reasonable value" of the goods, which is the NGPA incentive price. CIG's customers contend that the deregulated price specified in the contract applies, not the 60/40 price.[18] They also contend that there is no basis in the record for the 60/40 ratio because CIG's customers supplied all the risk capital.

IV. Discussion

A. Are the Opinion No. 77 Criteria Applicable?

In this case the judge found an ambiguity between the pricing language in the agreement and the Commission order approving it. After reviewing the testimony offered by the parties, he concluded that there was no meeting of the minds on what price would be placed on "new" gas if the Commission ceased to be the regulatory body setting rates, and Congress undertook that task, and particularly if Congress set the rates primarily on an incentive basis instead of the primarily cost basis used by the Commission in the past.[19] He then held "the criteria set out in Opinion No. 77 by which the intent of contracting parties is determined are not applicable because of the unique nature of the 1973 Settlement."[20] However, he later stated that if "they were [applicable], the criteria to preclude use of pertinent NGPA prices do not exist."[21] Finding no agreement upon a crucial term, and the Opinion No. 77 criteria not being applicable,

[17] We agree with the judge's conclusion that nothing in the testimonial or documentary evidence presented by CIG/CIGE demonstrated that the conduct of the parties during and subsequent to the gas search program evidenced an intent by CIG's customers to permit or acquiesce affirmatively in the collection of NGPA rates by CIG/CIGE. Even if CIG's customers, including PSC, theoretically had constructive notice of the fact that CIG was collecting NGPA rates through CIG's purchase gas adjustment filings with the Commission and its annual gas search program reports, the fact that PSC did not formally take action respecting the NGPA pricing issue until December 1982 did not amount to a "course of performance" under section 2-208 of the Uniform Commercial Code, which requires knowledge of the action taken. The judge determined constructive notice of knowledge was insufficient, and that CIG/CIGE had failed to demonstrate (as is required by U.C.C. § 2-208) that the principals of PSC who negotiated the 1973 Settlement had actual knowledge of the nature of CIG/CIGE's performance that allegedly constituted a violation of the agreement.

[18] Staff excepts to the judge's dicta that if the Opinion No. 77 criteria were applicable, then escalation to NGPA incentive prices would be permitted. Staff asserts (and CIG's customers concur) that the agreement contains language which would preclude NGPA pricing.

[19] 32 FERC at p. 65,119.

[20] *Id.* at p. 65,105.

[21] *Id.* at p. 65,126.

the judge supplied a "reasonable price," supposedly consistent with relevant case law and the Uniform Commercial Code, to replace the effectively "omitted" term on which there had been no agreement.[22]

We disagree with the judge's conclusion that the criteria of Opinion No. 77 are not applicable. The agreement represented the parties' agreement concerning the pricing of gas from CIG's properties. While this may be different from the traditional agreement between producers and their purchasers, we fail to see why the criteria are not applicable.[23] The pricing provisions of the agreement were customary area rate clauses, with a "Deregulation clause" containing a specific price. The issue presented by an indefinite price escalation clause is whether the parties intended by the language used "to allow the maximum rate permitted by law," or whether "only administratively, cost-based rates" were intended. Of course, if the parties specifically spelled out another permissible arrangement, we would carry out that intent. We recognize, however, that the agreement in question was entered into many years prior to enactment of the NGPA. Certainly we do not expect parties to have foretold the future. Rather, as Opinion No. 77 indicates, it is our duty to construe the contract, using the criteria set forth therein.

In the Order No. 23 series, the Commission concluded that it would ascertain and give effect to the contracting parties' intent. In Opinion No. 77, the Commission enunciated general criteria with regard to contractual interpretation, and specifically referred to a situation like this one where "the parties cannot agree on an interpretation of the area rate clause":

> However, if the parties themselves can not agree on the interpretation of an area rate clause, the Commission obviously can not be guided by either of their conflicting statements of intent. In such cases, the Commission must itself construe the contract. The starting point for analysis is the text of the contract. . . .
>
> * * *
>
> In those cases where there is no reliable and probative evidence of intent or where such evidence is inconclusive, the Commission will ascertain the intent of the parties on the basis of the test of the clause in dispute.[24]

To adopt the judge's position would virtually rule out the criteria in any two-party protest cases.[25] Yet the courts have implicitly recognized the validity of those criteria in two-party situations.[26] Moreover, in *Pennzoil v. FERC, supra.* n.13, the court held that in third-party protest cases where the presumption of intent to pay the NGPA price no longer governs, the Commission must decide the case by applying the criteria under the two-party situation.[27]

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[22] *Id.* at pp. 65,126-131.

[23] Opinion No. 77 itself dealt with indefinite price escalator clauses in two settlement agreements approved by the Commission in 1976, prior to the NGPA. Those settlements further provided for the renegotiation of price in the event of deregulation.

[24] 10 FERC at p. 61,398.

[25] Order No. 23 also discussed the procedure applicable where the parties to the contract agree on their intent, but third parties challenge that interpretation. In such "third party protest" cases, the contracting parties' agreement on their intent that the area rate clause authorized price increases to the maximum permitted by law established a presumption which protestors were required to rebut in order to obtain a hearing.

[26] In *Associated Gas Distributors v. FERC*, 810 F.2d 226 (D.C. Cir. 1987), the court affirmed the Order No. 23 presumptions set forth in Opinion No. 77, and the restatement of the Opinion No. 77 formulation in Opinion No. 135, 17 FERC ¶ 61,232 (1981).

[27] The court stated (789 F.2d at 1141-42 n. 32):

> In two-party protests, the Commission stated that it would "construe the contract language utilizing the guidelines established in Opinion No. 77 if neither party is able to establish intent [,]" because

The CIG agreement, while different from the usual producer-pipeline contract, was not unlike other arrangements entered into at that time, arrangements which the Commission noted in its order approving the agreement. Under these circumstances we conclude that Opinion No. 77 criteria are applicable to CIG's agreement in determining the intent of the parties.

B. The Opinion No. 77 Criteria

The judge stated that there was no "meeting of the minds" as to what would occur if Congress and not the Commission regulated the price. He then proceeded to supply the missing term by determining what he thought the parties would have agreed to had they addressed that possibility. We believe that this was not proper and goes beyond the Commission's role in these types of disputes. In this case, as in other disputed "area rate" escalation cases, the parties did not spell out what would happen if Congress instituted an incentive based price. It is the Commission's task to interpret the contract and determine what was intended by the agreement that was entered into, not to discern the agreement the parties would have entered into if they had anticipated that specific occurrence.[28] The Commission articulated criteria in Opinion No. 77 to assist in determining that intent.

In Opinion No. 77, the Commission held that where the parties to a contract disagree as to interpretation of the area rate clause as they do here:

> [T]he Commission will ascertain the intent of the parties on the basis of the text of the clause in dispute. In such situations, we will generally conclude that a contract containing an area or national rate clause does not authorize collection of all NGPA rates if it contains the following disqualifying terms:
>
> (1) It refers to rates established or prescribed by an administrative body;
>
> (2) It couples the reference to administrative action with a reference to the Natural Gas Act or the "just and reasonable" standard of that Act; and
>
> (3) It contains no additional language which has the effect of uncoupling the link between agency action and the statutory standard of the Natural Gas Act.
>
> * * *
>
> If these disqualifying terms are not all present, we would generally find that an area or national rate clause authorizes NGPA rates. [emphasis in original].[29]

The judge stated in *dicta* that the Opinion No. 77 criteria to preclude NGPA pricing were not met. He found that the first criterion, "a rate established or prescribed

(Footnote Continued)

the parties disagree over the meaning of the clause and their intent at the time of its execution. Opinion No. 181-A at 61,371. Therefore, "the language of the contracts is the only reliable evidence of intent and the Commission will independently construe it in order to resolve the case if the evidence is inconclusive." In large measure, it is apparent to this court that the Commission's difference in treatment between third-party protests stems from its construction of the Order No. 23 presumption. Once the presumption disappears, the central question presented in third-party protests becomes the same as in two-party protests --the proper construction to be given the contracts.

[28] The judge's reliance on *North Central Airlines v. Continental Oil Co.*, 574 F.2d 582 (D.C. Cir. 1980), is misplaced. In that case the contract referred to a "posted price". After price controls were instituted there were two posted prices, and there was no basis for choosing one price over another. The court directed the trial court to determine what was a reasonable price under those circumstances. However, in this case it is not a matter of the contract providing two different prices, but whether the area rate clause permits escalation to the NGPA incentive prices.

[29] Opinion No. 77, 10 FERC at p. 61,398.

by an administrative body," was not satisfied because the clause did not clearly provide that the nation wide rate would be established by the Commission. This apparently was based on the fact the word "established" was used in connection with nationwide rate separate from "area rate established by the Commission"[30] so that the nationwide rate was not "necessarily one established by an administrative body."[31] However, he found that the criterion, "coupling the reference to administrative action with a reference to the Natural Gas Act or the just and reasonable standard of that Act," was satisfied. He held that although the pricing clause did not have the necessary coupling, any other part of the contract could supply it, and that the preamble met this criterion.[32]

We agree with the judge that the Opinion No. 77 criteria to preclude NGPA pricing were not met. However, we find that the second criterion was also not satisfied. The preamble does not provide the necessary coupling because a preamble is, by its nature, general and not meant to provide specific guidance. Furthermore, Opinion No. 77 discussed whether "the area rate clause refers to rates established under the Natural Gas Act."[33] This coupling in the clause could be overcome by "subsequent language in the contract [which] uncouples the escalation clause from the Natural Gas Act."[34] Thus, the most reasonable interpretation of the criterion is that the coupling should be found in the escalation clause, but that uncoupling can occur in any other part of the contract. In this case there was no coupling in the escalation clause, and thus this criterion to preclude NGPA pricing was not satisfied.

The Opinion No. 77 criteria apply to situations like the one in this case where the parties to the contract disagree over intent. Where the extrinsic evidence does not resolve the issue, as the judge held in this case it did not, the issue is to be determined by interpreting the contract language under those criteria.[35] Accordingly, we hold that the Opinion No. 77 criteria were applicable, and because the language of the agreement did not preclude NGPA prices under those criteria, there was contractual authorization to pay the NGPA incentive prices.

C. The Applicable NGPA Price

Having concluded that the agreement authorized escalation to NGPA prices, it is necessary to determine the applicable NGPA prices. We find no error in the judge's conclusion that the tight-sands gas could not qualify for the incentive price under NGPA section 107(c)(5).[36]

In order for tight-sands gas to qualify for the special section 107(c)(5) tight-sands incentive price (200 percent of the section 103 ceiling price), the sale of the gas must be governed by a "negotiated contract price."[37] Section 271.702(a)(1) defines "negotiated contract price" as "any price established by a contract provision that specifically references the incentive pricing authority of the Commission under section 107 of the NGPA, by a contract provision that prescribes a specific fixed rate, or by the operation

[30] Area rate was defined in the agreement as "the applicable area rate, or nationwide rate if such should be established, from time to time established by the Commission." 32 FERC at p. 65,125, *see* p. 2 *supra*.

[31] *Id.* at p. 65,125.

[32] The preamble to the agreement stated, in part:

> All parties were able to arrive at a basis for the issuance of the authority sought which will serve the public interest while at the same time conforming to the objectives of the Act in protecting CIG's resale customers against excessive or unreasonable rates.

[33] Opinion No. 77, fn. 17.

[34] *Id.*

[35] *See Pennzoil, supra* n. 11; *United Gas Pipe Line Company*, 37 FERC ¶ 61,249 (1986).

[36] 15 U.S.C. § 3317(c)(5) (1982).

[37] 18 C.F.R. § 271.703 (1986).

of a fixed escalator clause." Although CIG and CIGE agreed to contractual amendments in 1981 which contained the necessary surcharge to satisfy the regulation, we agree with the judge that these amendments did not constitute a "negotiated contract price" as required under the Commission's tight-sands regulations because the "new gas" pricing provisions precluded CIG/CIGE from charging rates for new gas under any pricing procedure or formula other than as set forth in Article II, section 7 of the Settlement.

Sellers whose contracts do not contain a negotiated contract price may negotiate with the buyer to amend the contract.[38] The Commission stated in Order No. 99 (where the Commission promulgated the negotiated contract price requirement) that the purpose of the requirement is "to insure that the incentive maximum lawful price is extended as an *incentive* for the production of additional new tight formation gas, rather than as a windfall to the sellers."[39] The signatories to the 1973 Agreement never had an opportunity to participate in the bargaining process since the contract renegotiation took place between affiliates CIG and CIGE. The Commission had noted in Order No. 99 that "the imposition of the negotiated contract price requirement is therefore necessary to insure that a purchaser is given an opportunity to bargain for increased production of tight formation gas before he agrees to pay a price higher than the otherwise applicable maximum lawful price."[40] Given the express language in the "new gas" pricing provision prohibiting any form of pricing other than that specifically provided for in Article 7, we find that absent some affirmative assent for modification to the Agreement agreed to by the signatories, CIG and CIGE did not have the contractual authority to reach a "negotiated price" as is required under the Commission's regulations. We find nothing inconsistent with our other conclusions that NGPA prices were applicable, because to collect the tight formation price, specific agreement to that incentive price is required. In contrast, the area rate clause permits automatic escalation to the NGPA prices, once the requisite intent is found, and no specific reference to NGPA pricing is required.

In view of our decision, one further ruling by the judge must be reviewed. Under NGPA section 107(c)(1), production from a completion location at a depth greater than 15,000 feet qualifies as high-cost natural gas if the surface drilling of the well producing that gas began on or after February 19, 1977. The maximum lawful price for section 107(c)(1) deep gas ceased to be applicable by virtue of NGPA section 121,[41] which deregulated gas under sections 107(c)(1)-(4) as of November 1, 1979, when incremental pricing became effective.

Article II, section 2 of the agreement provided that the price of new gas "in the event that area rates should cease to be applicable to such gas" would be the "area rate price in effect prior to Deregulation, escalating at the rate of 1.5¢ per Mcf" annually thereafter. CIG contends that NGPA sections 102 and 103 prices are available for deep new gas because NGPA section 101(b)(5)[42] provides:

> If any natural gas qualifies under more than one provision of this title, providing for any maximum lawful price, or for any exemption for such price, with respect to any first sale of natural gas, the provision which could result in the highest prices shall be applicable.

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[38] Regulations Covering High Cost Natural Gas Produced From Tight Formations, Order No. 99, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,183, at p. 31,271 (1980).

[39] *Id.*

[40] *Id.* at p. 31,273.

[41] 15 U.S.C. § 3331(b) (1982).

[42] 15 U.S.C. § 3311(b)(5) (1982).

Because "deep gas" fits the criteria of NGPA sections 102 and 103, CIG asserts that after November 1, 1979, it was entitled to collect the maximum lawful prices for deep gas under those sections. On the other hand CIG's customers argue that even if the agreement authorized NGPA incentive prices, the deregulation clause of the agreement governs as to deep new gas, as of November 1, 1979.

> In the initial decision the judge concluded that: The question is what reasonable provision would the parties have made in 1973 if they had anticipated a situation where gas qualifies for more than one incentive price and it later only qualifies for one. On the basis of how the parties treated the possibility of oil reserves being discovered, it is concluded that they would have continued to apply any incentive price for which the gas qualified and that the incentive portion of the price would be shared in accord with the respective contributions to the Program Fund.[43]

Because we have concluded that the settlement authorized NGPA prices, the judge's decision cannot stand.

In FERC v. Martin Exploration Management Co.[44] the Supreme Court upheld Order No. 406[45] wherein the Commission held that natural gas which qualified for both regulated and deregulated treatment under the NGPA would be treated as deregulated gas. Although Order No. 406 was primarily concerned with gas qualified under NGPA sections 107(c)(5) and 108, it nevertheless applies to the issue before us. In this case deep gas that qualified under 107(c)(1) was deregulated on November 1, 1979. Thus as of that date, the deregulated price in the agreement governs, and CIG was not entitled to collect the NGPA sections 102 and 103 prices after that date. Since the annual escalation of 1.5¢ per Mcf under the agreement is less than the escalation provided under NGPA sections 102 and 103, CIG must refund the excess amount it has collected for the deep gas.

D. Miscellaneous

With respect to the other issues, the judge ruled that CIG had acted properly in administering and terminating the program except for the valuation of undeveloped leases acquired with Program funds. These leases, he held, should have been valued at their fair market value when transferred back to CIG, not at book value as CIG had valued them. He also held that the fair market value of these leases should be determined either by agreement or through further proceeding. We affirm the judge on these rulings.

V. Summary

Under our decision CIG is entitled to collect certain NGPA incentive prices. However, we are affirming the initial decision on the "tight sands" issue, and the undeveloped lease valuation, which impose a refund obligation upon CIG. Similarly, GIC must refund the excess amount it collected for the section 107(c)(1) "deep gas." Accordingly, we shall order CIG to file a report within 45 days of the date of this order, setting forth the amount of repayment due including interest, and the proposed repayment plan.

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[43] 32 FERC at p. 65,132.

[44] 56 U.S.L.W. 4458 (U.S. May 31, 1988) (Nos. 87-363 and 364).

[45] Deregulation and other Pricing changes on January 1, 1985, under the Natural Gas Policy Act, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,614 (1984); Order on reh'g, ¶ 30,622 (1984) (Order No. 406-A). Order No. 406 is codified in 18 C.F.R. § 270.208 (1987).

The Commission orders:

(A) The initial decision is affirmed and adopted in part and reversed in part in accordance with this opinion and order.

(B) Within 45 days of the date of this order, CIG shall file the report required.

(C) All exceptions not granted are denied.

[¶ 61,024]

Canyon Creek Compression Company, Docket No. CP88-283-000

Order Denying Application for Permission and Approval to Abandon and Disclaimer of Jurisdiction

(Issued July 7, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon and Charles A. Trabandt.

On March 10, 1988, Canyon Creek Compression Company (Canyon Creek) filed in Docket No. CP88-283-000 an application pursuant to section 7(b) of the Natural Gas Act (NGA) for permission and approval to abandon a 22,000 horsepower compressor station and appurtenant facilities in Uinta County, Wyoming, and the service rendered thereby and for a disclaimer of jurisdiction over these facilities and services under the NGA. Canyon Creek maintains that the facilities and service are no longer subject to regulation under the NGA based on an alleged change in the primary function of the compressor station. Canyon Creek contends that the subject facility satisfies the "behind the plant" and the "primary function" tests, used to delineate between regulated transportation and non-regulated gathering under the NGA, due to its location at the tailgate of a processing plant operated by Amoco Production Company (Amoco) and due to alleged changes in the nature of the businesses of Canyon Creek's compression customers. For the reasons set forth herein, the Commission finds that the facilities and services continue to be subject to regulation under the NGA.

Background

By order of March 30, 1981, in Docket No. CP80-547-000, *NGPL-Canyon Compression Company*, 18 FERC ¶ 61,280, the Commission authorized the construction and operation of a compressor station and appurtenant facilities for the compression and delivery of gas at 1,000 psi into the origin of the Overthrust segment of the Trailblazer Pipeline Company system (Trailblazer). The Commission found that NGPL-Canyon Compression Company (NGPL-Canyon), Canyon Creek's predecessor in interest, would be a natural-gas company within the meaning of the NGA, that the facilities would be used in the transportation of natural gas in interstate commerce, and that the operation of the compressor station and the transportation of natural gas by NGPL-Canyon would be subject to the requirements of subsections (c) and (e) of section 7 of the Natural Gas Act

Interventions

After due notice by publication in the *Federal Register* on March 23, 1988 (53 Fed. Reg. 9968), timely unopposed motions to intervene were filed by Amoco Production Company; Colorado Interstate Gas Company; Columbia Gas Transmission Corporation; Natural Gas Pipeline Company of America; Northwest Pipeline Corporation; Overthrust Pipeline Company; Questar Pipeline Company; Union Pacific Resources Company; and Wyoming Interstate Company Ltd. No further motions to intervene, notices of intervention, or protests to the granting of the application have been filed. Timely unopposed motions to intervene are granted automatically by operation of Rule 214.

Discussion

Canyon Creek contends that the primary function of the compressor facilities is "to facilitate the marketing of gas by producers."[1] This, according to Canyon Creek, is due to the fact that "the role of interstate pipelines in the gas transmission industry has been changing from one of purchaser-wholesaler of gas to one of transporter of gas."[2] Canyon Creek suggests that this function is accomplished by increas-

[1] Canyon Creek Application at p. 7

[2] Canyon Creek Application at p. 6.

Utah Parks co. v. Iron County,

380 P.2d 924 (Utah 1963)

A. Pratt Kesler, Atty. Gen., Ronald N. Boyce, Asst. Atty. Gen., Salt Lake City, for respondent.

HENRIOD, Chief Justice.

Appeal from a burglary conviction. Affirmed.

Defendant and his girl friend deliberately planned the theft of a television set from a motel and accomplished it. The modus operandi was to display a phony driver's license and deliver a forged check, under an alias. Under these circumstances, they were admitted to the motel and defendant stole the television.

Defendant says that obtaining the owner's consent to enter precludes any question of burglary under these circumstances. Under our statute, a burglary can be committed either with or without force or a breaking, the vital circumstance being the intent to commit larceny or any felony.[1] The necessary intent and the fact of larceny were shown here to the satisfaction of the veniremen. The contention that consent to enter inoculates against burglary is not tenable, since the consent that would do so is not synonymous with consent obtained by trick or deception, as was the case here,—which so far as burglary is concerned, is no consent at all.[2] It is as derelict to trick one into an entry as to shove one's fist through a glass door, though the latter may be more hazardous and painful.

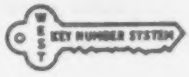
Defendant's contention that the television was a fixture, not personalty, is without merit. There was no convincing evidence one way or the other; if it were a fixture, it was severed and became personalty, and furthermore, such contention was urged for the first time on appeal.

Defendant's counsel was court-appointed and is to be commended and thanked for an excellent presentation.

McDONOUGH, CALLISTER, CROCKETT and WADE, JJ., concur.

1. Title 76-9-3, Utah Code Annotated 1953.

2. Clark & Marshall, Crimes, 6th ed., Sec. 13.07, p. 881.



380 P.2d 924

UTAH PARKS COMPANY, a corporation, Plaintiff and Appellant,

v.

IRON COUNTY, a Body Corporate and Politic, and Cedar City Corporation, a Municipal Corporation, Defendants and Respondents.

Nos. 9540 and 9753.

Supreme Court of Utah.

April 30, 1963.

Action by private corporation for refund of property taxes paid to county levied

on property it had conveyed to municipal corporation or, in alternative, reimbursement to it by municipal corporation of taxes so paid. The Fifth District Court, Iron County, C. Nelson Day, J., entered judgments of dismissal as to each action and plaintiff appealed. The Supreme Court, Callister, J., held that, although private corporation owned property on January 1 when lien for tax attached, where it was conveyed to tax-exempt municipal corporation prior to assessment and levy, ad valorem tax upon property was erroneously and illegally levied and collected and private corporation was entitled to refund of taxes paid.

Judgment of dismissal in favor of county reversed and judgment of dismissal in favor of city affirmed.

Taxation ⇐79

Although private corporation owned property on January 1 when lien for tax attached, where it was conveyed to tax-exempt municipal corporation prior to assessment and levy, ad valorem tax upon property was erroneously and illegally levied and collected and private corporation was entitled to refund of taxes paid to county. U.C.A.1953, 59-5-4, 59-10-3, 59-10-14; Const. art. 13, § 2.

Bryan P. Leverich, A. U. Miner, Howard F. Coray, Scott M. Matheson, Gary L. Theurer, Salt Lake City, for appellant.

Orville Isom, J. Harlan Burns, Cedar City, for respondents.

CALLISTER, Justice.

In this action plaintiff sought a refund of the 1958 property taxes paid by it to Iron County levied on the El Escalante Hotel, or, in the alternative a reimbursement to it by Cedar City Corporation of the taxes so paid. From judgments of dismissal as to each action, plaintiff appeals.

On January 1, 1958, plaintiff was the record owner of the El Escalante Hotel property located in Cedar City, Iron County, Utah. On January 31, 1958, plaintiff conveyed, by warranty deed, the property to Cedar City, a tax-exempt municipal corporation.[1] The deed contained the following covenant:

> All taxes and all assessments, general and special, and all installments of assessments lawfully levied upon or assessed against the premises hereinbefore described which become due and payable subsequent to the date hereof, which taxes the grantee (Cedar City) hereby assumes and agrees to pay.

The 1958 ad valorem tax assessment and levy upon the hotel property was made and processed in plaintiff's name and plaintiff received the valuation and tax notices thereon. On or about November 26, 1958, plain-

1. Art. XIII, Sec. 2, Utah Constitution.

tiff, without protest, paid the 1958 tax so assessed and levied.

The following year the plaintiff sought unsuccessfully to secure a reimbursement from Cedar City by virtue of the covenant in the deed and unsuccessfully applied for a refund from Iron County pursuant to 59–10–14, U.C.A.1953.[2]

It is the contention of the plaintiff, concurred in by defendant Cedar City, that the 1958 tax was erroneously and illegally collected by the county for the reason that the transfer to the tax-exempt municipality occurred prior to assessment and levy, although, admittedly after the statutory lien date of January 1st.

Section 59–10–3, U.C.A.1953 provides: "Every tax upon real property is a lien against the property assessed; and every tax due upon improvements upon real estate assessed to other than the owner of the real estate is a lien upon the land and improvements; which several liens attach as of the 1st day of January of each year."

Section 59–5–4, U.C.A.1953 provides: "The county assessor must, before the 15th day of April of each year, ascertain the names of all taxable inhabitants and all property in the county subject to taxation except such as is required to be assessed by the state tax commission and must assess such property to the person by whom it was owned or claimed, or in whose possession or control it was, at 12 o'clock m. of the first day of January next preceding, and at its value on that date. * * *"

Iron County argues that the ad valorem tax must be assessed to the owner of the property on January 1st and that a valid, enforceable lien exists as of that date regardless of any transfers of ownership that might occur prior to subsequent assessment and levy. This is undoubtedly true if the parties involved do not enjoy a tax-exempt status. However, a difficult question is presented when the property, subject to taxation on January 1st, is subsequently transferred to a tax-exempt body prior to assessment and levy.

Authorities are divided upon this question, and we are not unmindful of the cases from other jurisdictions cited by the county which undoubtedly support its position. However, we are of the opinion that question must be resolved in favor of plaintiff's contention by virtue of the decision of this court in Gillmor v. Dale.[3] In that case certain property, by court decree, was disconnected from the territory of Salt Lake

2. "* * * Any taxes, interest and costs paid more than once, or erroneously or illegally collected, may, by order of the board of county commissioners, be refunded by the county treasurer. * * *."

3. 27 Utah 372, 75 P. 932. This case was cited with approval in State v. Suohomish County, 71 Wash. 320, 128 P. 667 (1912), which is similar to the instant case.

City after the lien date, but prior to assessment and levy. It was there held that the disconnected property was not legally subject to Salt Lake City's tax levy and therefore no lien existed.

It is true that in the Gillmor case the lower court in its decree of disconnection specifically provided that the disconnected property should not be subject to Salt Lake City for any taxes. However, we think this court would have arrived at the same conclusion had such a provision not been included in the decree. It cited with approval the rule that no tax or assessment can exist so as to become a lien upon real property until the amount thereof is ascertained and determined and then stated:

> "Under the provisions of the Revised Statutes a city tax does not become a lien on real estate until the rate thereof is fixed, and the tax levied, in pursuance of sections 239, 2694; but when the rate is so fixed, the amount determined and levied, a lien on each tract of real estate assessed by the assessor attaches, by relation, for the amount of the tax thereon 'as of the first Monday of February' preceding the levy. (Citing cases.)
>
> "The city council was not authorized, either under the Constitution or by the provisions of the Revised Statutes, to levy a tax, except on property within its corporate limits, and any levy upon property not within such limits is without authority and void. As no lien can exist for taxes illegally levied, the appellant's [treasurer's] contention in respect to the lien claimed in this case is untenable."

We adhere, in the instant case, to the reasoning of the Gillmor case and reach the conclusion that the 1958 ad valorem tax upon the El Escalante Hotel property was erroneously and illegally levied and collected by Iron County. In reaching this conclusion, it should be noted that the controlling feature is not the mere change of ownership, but rather a change of ownership which has the effect of converting property from a taxable status to that of nontaxable.

Having determined that the tax in question was erroneously levied and collected, it follows that plaintiff's application for refund under 59-10-14, U.C.A.1953, was proper and the board of county commissioners should have ordered the tax refunded.[4]

The judgment of dismissal in favor of Iron County is reversed with instructions to enter judgment in favor of plaintiff. The judgment of dismissal in favor of Cedar City is affirmed. No costs or interest awarded to any party.

HENRIOD, C. J., and McDONOUGH, CROCKETT and WADE, JJ., concur.

4. Nielson v. San Pete County, 40 Utah 560, 123 P. 334.